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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

CITY OF INDIANAPOLIS, et al.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, et al.,
Respondents.

10, 11, 12 - 13

Nos. ~~421, 422, 423, and 424.~~

BRIEF OF

THE INDIANAPOLIS GAS COMPANY, RESPONDENT

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ABBREVIATIONS

The following abbreviations will be used for convenience throughout this brief:

Articles	The Articles of Incorporation of Citizens Gas Company (I R. 95-100).
Bonds	The First Consolidated Mortgage 5% Gold Bonds of the Indianapolis Gas Company issued October 1, 1902 (I R. 25-27).
Chase	Chase National Bank of the City of New York, Trustee, plaintiff and cross-petitioner herein.
Citizens Gas	Citizens Gas Company of Indianapolis, lessee, defendant and respondent.
City	City of Indianapolis, and the members of its Boards of Trustees and Directors for Utility of said City.
Indianapolis Gas	The Indianapolis Gas Company, defendant below and respondent here.
Cross-petitioner	Chase National Bank of the City of New York, Trustee.
Cross-petitions	Petition for certiorari in Causes Nos. 423, 424 by Chase, plaintiff below.
Coupons	The interest coupons attached to the 5% Gold Bonds of Indianapolis Gas Company.
Franchise	The franchise contract ordinance of August 30, 1905, assigned to Citizens Gas Company May 24, 1906 (I R. 81-95).

Lease	The lease from Indianapolis Gas to Citizens Gas dated September 30, 1913 (I R. 51-80).
Mortgage	Mortgage Deed of Trust from Indianapolis Gas to predecessors of Chase, dated October 1, 1902 (I R. 23-51).
Petition	Petition for writ of certiorari in Causes Nos. 421, 422, by the City, et al., defendants and counter-claimants.
Petitioners	City and the officers of its Department for Utilities, defendants and counter-claimants who joined in the petition in Causes Nos. 421, 422.
Respondents	Chase, Indianapolis Gas and Citizens Gas.
Stipulation	Stipulation that certain "facts are true", including many "Exhibits" as therein stated (II R. 616-639), signed by solicitors for all parties (II R. 639).
Circuit Court of Appeals	Circuit Court of Appeals for the Seventh Circuit.

(Note)

This brief of Indianapolis Gas Company is submitted for all four cases, to wit: 421, 422, 423 and 424.

All emphases in this brief are supplied.

IN THE

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OCTOBER TERM—1940

CITY OF INDIANAPOLIS, et al., *Petitioners,* v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents.*	Nos. 421, 422, 423, and 424.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Cross-Petitioner,* v. CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	

BRIEF OF

THE INDIANAPOLIS GAS COMPANY, RESPONDENT

A.

THE OPINIONS BELOW

The opinion of the District Court (III R. 1122 to 1159) is not officially reported. The opinion of the Circuit court

of Appeals (IV R. 1281 to 1306) is reported in 113 Fed. (2d) 217.

B.

JURISDICTION

These cases are before this Court upon the granting of the petitions for writs of certiorari of petitioner City and the cross-petition for such writs by Chase National Bank, Trustee under this respondent's mortgage deed of trust. The jurisdiction of the Court was invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C., Sec. 347).

C.

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case and the facts thereof as set out in the brief of cross-petitioner and respondent Chase is accurate with the exception of a statement made at page 22 that the agreement of March 2, 1936, between City and Indianapolis Gas was made "in direct violation of the rights of the trustee and of the bondholders". This statement of a legal conclusion is denied here as it was in the District Court and before the Circuit Court of Appeals. Certain corrections are also offered as to statements in City's brief; the facts fully and clearly stated in the briefs of said petitioner and cross-petitioner Chase will not be repeated here but are supplemented as follows:

Certain omitted factual situations surrounding the execution of the 99-year lease by Citizens Gas, original trustee, and Indianapolis Gas, are pertinent for consideration.

Prior to September 30, 1913, Citizens Gas and Indianapolis Gas were competing manufacturers and distributors

of gas in the City of Indianapolis. The former company was operating its properties as a public utility and as trustee of a public charitable trust, subject to the rights of the investors, and at that time owned its gas plant and 184 miles of mains and 11,165 meters in use. Indianapolis Gas was operating a competing gas plant in the same city with 383 miles of main and 41,541 meters (III R. 901; offered II R. 342), and in that year was beginning extensive improvements in its equipment and the methods of manufacturing gas, all of which necessarily would adversely affect Citizens Gas as a competitor. The capital stock of Indianapolis Gas was owned entirely by non-residents of Indiana.

The directors and trustees of Citizens Gas had increased its capital stock, issued mortgage bonds and found that the competition with Indianapolis Gas "has not been without dangers in the past, and may be found to be more dangerous in the future" (III R. 887; offered II R. 342). In this situation the managers of Citizens Gas appealed to one Malott and a group of residents of Indianapolis and urged upon them the acquiring of sufficient of the capital stock of Indianapolis Gas to make possible a merger of the two competing companies under control of Citizens Gas.

This picture is clearly presented in the resolutions of the directors of Citizens Gas adopted at their meeting of February 26, 1913 (II R. 644-5; offered II R. 327).

> "Whereas Volney T. Malott for himself and associates *at the suggestion of persons connected with the management of this Company* has been in negotiation for the purchase of a control of the Indianapolis Gas Company with the sole object of bringing the plants and gas system of said Company under the control of the Citizens Gas Company, and such

negotiations have now reached a point where the said Volney T. Malott must close or abandon the same, and *he is unwilling to close the same except under proper assurances that if he acquires such control a proper lease will be entered into by the Citizens Gas Company, for the taking over of such property;*

"Now therefore be it resolved by the Board of Directors of the Citizens Gas Company of Indianapolis that the President and Secretary of the Company be and they are hereby authorized to execute on behalf of the Company the contract with V. T. Malott this day read at the meeting of the Board, and in event said V. T. Malott and his associates shall acquire control of the Indianapolis Gas Company so as to authorize the execution of the form of lease accompanying said contract, that then the President and Secretary of this Company be and they are hereby authorized to enter into said contract of lease on behalf of this Company, and in connection therewith to consent to any changes in form in said lease which in their judgment do not vary the material rights acquired and obligations incurred by this Company."

The above action was approved and ratified at a meeting of the Trustees of Citizens Gas held at a subsequent hour on the same day (II R. 646). Pursuant to and in reliance upon this agreement, approved in the above resolution, the local Malott group did purchase sufficient of the capital stock of Indianapolis Gas as might make possible a lease effecting the merger of the two utility properties under the unified control of Citizens Gas for the term of 99 years, and a joint petition was filed by both companies with the Public Service Commission of Indiana seeking approval of the lease. Said petition stated, *inter alia* (II R. 652, 653; offered II R. 328):

"4. That the interest of the public generally and of the stockholders of the undersigned companies require that said plants shall be put under a single management, the wasteage of further duplicate service and dual operation terminated, if the same can be done on proper terms and conditions.

"5. That as will be seen from the accompanying copy of its charter, by-laws and franchise from the City of Indianapolis under which it operates, the Citizens Gas Company of Indianapolis is largely a cooperative institution organized for the purpose of affording to the public the benefits of cheap gas with limited dividends to the stockholders, and providing for an ultimate transfer of the property on certain conditions to the City of Indianapolis for the benefit of the entire public; and it is believed that the lease now proposed will promote the realization of the purposes of the organization of said company" (II R. 652, 653; offered II R. 328.)

Following a protracted hearing, at which the City of Indianapolis was represented by its Corporation Counsel (I R. 116; offered II R. 327), the Commission granted the petition and approved the lease with certain modifications which were accepted by the parties and embodied therein.

From October 1, 1913, until September 9, 1935, Citizens Gas, the original trustee of the public charitable trust, operated the leased property as part and parcel of its unified system, and from September 9, 1935, City, as successor Trustee, has continuously operated the same and is now so doing.

The plaintiff below, suing in behalf of bondholders of Indianapolis Gas, sought a judgment declaring the 99-year lease to be valid and also a coercive judgment against all parties defendant for the amount of unpaid bond interest together with interest thereon and also for certain other

relief. Before trial an order was entered by the District Court that the cause should go to trial and

> "That the evidence shall be heard upon the issues whether the lease * * * is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas * * * or against Indianapolis Gas or Citizens Gas * * * and whether plaintiff is entitled to judgment for the rental under said lease or for interest on the bonds of Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property;"

and that evidence should be deferred on one reason assigned by City of Indianapolis upon which it claimed

> "the right as such successor-trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the court at any stage in the proceeding." (II R. 321, 322.)

As to Statements in City's Brief

In 1905 the contract which became the franchise of Citizens Gas was executed (I R. 81-94, offered II R. 327) and provided that, within 18 months after the sale of the discontinued gas mains of the Consumers Gas Trust Co., it should "*secure, acquire* or *construct*" and put in operation a gas plant with not less than 100 miles of mains (I R. 85).

The contract also contained the provision creating the public charitable trust, providing that upon repayment of the investment of settlors with interest at 10% per annum,

the entire property should, at the expiration of 25 years at the option of City thus be conveyed to City as successor Trustee, subject to legal obligations (I R. 84, (f), (i); offered II R. 327).

By the provisions of the City franchise and the contract, written into the Articles of Incorporation of Citizens Gas, any "benefit to gas users" was expressly made subject to the prior use of all "earnings of said Company" to pay "semi-annually dividends of 10% per annum and any unpaid accrued dividends", and other legal obligations incurred by the Company (I R. 84, (f) 98, 9; offered II R. 327).

The trust *res* was to consist of all rights, property and assets of every kind and character which Citizens Gas might originally or thereafter acquire (I R. 93, 99; offered II R. 327). Citizens Gas was incorporated under the general statutes of Indiana and its sole purpose, as a public utility and as provided by its articles, was to "furnish the inhabitants of Indianapolis with light, heat and power"; this was provided by the franchise to include "all the inhabitants of said City" (I R. 89, 90; offered II R. 327).

The sole purpose of Citizens Gas was to perform such purposes of a public utility, as so provided in its articles, with whatever property it had or might acquire under any characterization of title. By agreement of its stockholders expressed in its articles and stock subscriptions it was the trustee of a public charitable trust. Thus the corporation from its creation was to function as a public utility to supply light, heat and power to all inhabitants of the City of Indianapolis, and subject thereto to function as a trustee.

City, at page 9 of its brief, refers to its letter of July 23, 1935, to Indianapolis Gas and states that Indianapolis Gas agreed on September 30, 1935 "to make an arrangement for temporary use".

This letter (III R. 836; offered II R. 329) is significant in several particulars·

1. In its first paragraph is the unequivocal statement that the City would shortly take over the property "*which has been operated by Citizens Gas Company*".

2. In its second paragraph it narrates the execution of the ninety-nine year lease and its approval by the Commission. No intimation or charge is made that it was or is invalid.

3. In its third paragraph it states that City in acquiring the property of Citizens Gas does not become liable "for the obligations of that company" by virtue of the Act of March 11, 1929.

It will be noted no distinction is made between the lease obligations and any others which were incurred by Citizens Gas in its operations.

The letter can only mean that City did not become directly obligated *as a municipality*, which is correct. It necessarily meant, by referring to the statute, "that the obligations of that company" were to be a charge only upon the property so taken over, which is all this respondent has sought in this litigation.

The letters exchanged on September 30, 1935 (III R. 968, 969; offered II R. 385) do not spell out an agreement on the part of Indianapolis Gas to the use and possession of its property by City. The letters simply provide that by receiving payment from City of certain interest on its

bonds, Indianapolis Gas waived no rights nor did City concerning their separate contentions as to liability under the lease.

The letter of City stated:

> "We ask you to waive no rights of yours by accepting; and you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indianapolis * * *"
>
> "We will make these payments without prejudice to our position or rights and you may accept the same without prejudice to your position or rights * * *"

And the letter of Indianapolis Gas in reply stated:

> "You making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in relation thereto." (III R. 968, 969; offered II R. 384, 385.)

The agreement of March 2, 1936 (I R. 205-207; offered II R. 327) makes no reference to and was not an "extending" of any previous agreement; it was an agreement providing for the use *thereafter* of the property of Indianapolis Gas which should continue pending a settlement or final adjudication of the controversy under which payment of the cash rentals under the lease, including interest on Indianapolis Gas bonds and dividends on its stock, was to be made to a bank as escrow agent without waiver by either party of their respective contentions concerning the validity of the lease. Certain characterizations concerning the acceptance of the assignment of the lease and the City's so-called "resolution of rejection" are subsequently discussed in this brief.

D.

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals Did Not Impose Any Obligation or Burden Upon the City's Revenues Raised By Taxation But Merely Imposed an Obligation Upon the Trust Property and Upon the City as Trustee

(Brief, pp. 24-26.)

No important public question is here involved such as is stated by the City. The sole obligations imposed upon City, by the judgment here for review, are upon it as a successor trustee of a public charitable trust which consists of the present entire gas system in the City of Indianapolis. The decision of the court of appeals, following express Indiana statutes, precludes any obligation of City to satisfy the judgment through exercise of its municipal power to levy and collect taxes.

The principal question presented is whether the lease obligations of a trust, validly created, acquiesced in and defended by all the parties for 22 years, may be destroyed by the mere substitution of trustees; an obligation created by the trust as a public utility under authority both of its own charter and of an express statute of the state controlling such utilities.

II

The Judgment Correctly Decreed That the Obligation of Indianapolis Gas for Payment of Interest on Its Bonds Was Secondary to That of the Trust, City As Trustee and Citizens Gas; the Latter Being Principal Obligors. Jurisdiction Was Not Defeated or Affected by the Order of Liability Adjudged Against All Defendants

(Brief, pp. 27-29.)

On October 1, 1913, Citizens Gas leased for 99 years all property of Indianapolis Gas and by the terms of said lease agreed to pay all interest on Indianapolis Gas bonds as it accrued. From that date Citizens Gas and City, its successor trustee, have been in possession and operation of the entire property of lessor. Citizens Gas on September 9, 1935 conveyed and assigned to City, as its successor, its entire property, both personal and real and including the lease in question, subject to all its legal obligations. Prior to the day of transfer Citizens Gas, in accord with the lease provisions, had paid all interest as it became due on Indianapolis Gas bonds.

City accepted said conveyance and assignment of all said property, took possession thereof, and by its directors for utilities, declared that neither it was bound to the terms of the lease nor was the trust property it had taken over.

Chase, as sole trustee under the Indianapolis Gas mortgage, brought suit for bondholders against City as successor trustee, Citizens Gas and Indianapolis Gas, seeking declaratory judgment that the lease was a valid obligation

of the trust and of both Citizens Gas and City as trustees, and seeking coercive judgment against all parties defendant in the amount of the unpaid interest coupons.

The validity or invalidity of the lease determined only whether *all* defendants were liable for said delinquent interest or whether the liability was *solely* that of Indianapolis Gas.

The District Court held the lease invalid and entered judgment solely against Indianapolis Gas for $1,032,150, the amount of the unpaid interest coupons, which judgment the Circuit Court of Appeals reversed.

The jurisdiction of the court could not and did not depend upon whether all defendants or only one was liable, or upon the order in which such liability should be borne by the several defendants. The jurisdiction of the District Court was fairly invoked and no realignment of any party defendant could properly have been made.

III

The Decision of the Circuit Court of Appeals Directing Judgment Against All Parties Defendant Without Retrial of the Alleged Issue of Burdensomeness of the Lease Did Not Deprive City of Any Right of Due Process

(Brief, pp. 29-62.)

City in its answer and counterclaim avers, as a ground of alleged invalidity of the lease, that it was burdensome upon it and the public charitable trust and that it therefore did not constitute a part of the *trust res* which it took over as successor trustee, and that in taking over the ad-

ministration of the trust neither it as trustee nor the trust was legally obligated to the fulfillment of the lease undertakings.

The District Court in a pre-trial order provided for trial of the issue whether or not the lease was a valid and enforceable obligation, reserving for future hearing evidence on one reason assigned by City for non-liability, viz: "whether City *had the right to refuse and reject an assignment* of the lease on the ground that said lease was burdensome."

The failure of Circut Court of Appeals to remand the cause to District Court for further hearings upon this issue did not deprive City of any right of due process for the reasons:

1.

City in Fact Accepted Assignment of the Lease and Took Possession of Entire Trust Property and Therefore Any alleged Grounds for Doing Otherwise Becomes Moot.

(Brief, pp. 32-38.)

Every act and statement of City, from the day it elected to succeed Citizens Gas as Trustee until it took over the property, was an unmistakable expression of intent to take over the trust in its entirety, towit: the gas system *operated* by Citizens Gas.

On March 20, 1929 City first elected to exercise its rights of succession by resolution of its Board of Public Works. Said resolution demanded of Citizens Gas that all its property of "whatever nature or character" be conveyed to it, subject to all "legal obligations against said company."

City, on May 7, 1935, by its board of directors for utilities, authorized bonds in the amount of $8,000,000 whose principal and interest were to be payable from and a charge only upon the net revenues derived from the operation of the gas system, described as the property "operated by Citizens Gas Company." In connection with the sale of said bonds, City issued a prospectus describing the gas system as one which consisted of 867 miles of mains and which was owned by Citizens Gas partly in fee and partly in leasehold for 99 years. It described the obligations and terms of the lease in detail, and stated that City would continue operation of the "system." The bonds were purchased by bankers in reliance on said statements, and they in turn sold and distributed them to the public upon similar statements contained in circulars.

With the proceeds of said bond sale City retired all capital stock of Citizens Gas, discharged its bond obligation and thereafter, on September 9th, received from said Citizens Gas separate instruments of conveyance and assignment, transferring all of its title and interest in all its property, including the lease in question. In each of said instruments it was provided that the said property was conveyed subject to all obligations of the grantor. City thereupon entered into possession and operation of all the gas property, including that under the lease, though by its board for utilities it passed the so-called "resolution of rejection" of the lease.

City operated said system, including the leased property, until March 2, 1936 under no authority or right other than as assignee of the lease and successor to Citizens Gas. On that date an agreement was made by City and Indianapolis Gas providing that the former might thereafter operate the leased property under certain stipulations with-

out waiver by either party of their claimed positions relative to the lease.

Having accepted assignment of the lease and possession of the leased property, any reason for not so doing is moot.

2.

That the Lease Was Not Burdensome Was Determined by the Public Service Commission and That It Was Not Invalid Upon Such Ground Was Conclusively Adjudged by the Courts of Indiana, All Binding on the Trust and on the City, Present Trustee.

THE ORDER OF PUBLIC SERVICE COMMISSION

(Brief, pp. 39-45.)

The lease was presented to the Public Service Commission by joint petition of Citizens Gas and Indianapolis Gas and after extended hearing, at which City appeared by counsel, it was ordered approved October 1, 1913 with certain modifications which were accepted. Thereupon Citizens Gas took over the leased property. The Indiana Public Utility Law, then in effect, provided that such leases might be made by utilities "at a price and on terms fixed by the commission." This statute also withdrew from cities the right to grant franchise to utilities and vested such powers in the Commission.

By law of the State the orders of the Commission may not be collaterally attacked in the courts, except on grounds of fraud or lack of jurisdiction in the Commission, neither of which has been charged by City in this cause. The find-

ings and order of the Commission are conclusive on all parties to this cause that the execution of the lease was in the public interest and a proper exercise by Citizens Gas of its power as trustee of a Public Utility.

City may not now collaterally attack the order of the Commission on the ground that "when executed this lease was in fact burdensome." The failure to remand the cause for hearing on this issue does not therefore deprive City of any right of due process of law.

FISHBACK v. PUBLIC SERVICE COMMISSION, ET AL., 193 Ind. 282

(Brief, pp. 45-51.)

During the hearing before the Commission one Fishback, as a resident of Indianapolis, intervened and urged denial of the petition for approval of the lease upon certain grounds substantially the same as those here urged by City. After denial of his original objection and also petition for rehearing, Fishback instituted a class suit for himself and all other citizens in the Marion County Superior Court against Indianapolis Gas, Citizens Gas, City and members of the Commission. He alleged that the order approving the lease was invalid and sought judgment vacating the same, cancelling the lease and also an injunction preventing the contracting parties from carrying it out. The complaint alleged as grounds for relief that the rentals of the lease were excessive, that it would prevent the fulfillment of the contract between Citizens Gas and City and that Citizens Gas had no power to execute the lease. City joined issue by general denial, but seven years later plaintiff dismissed as to it on day of judgment.

The judgment of the trial court is in full force and effect.

The judgment in this case is conclusive upon all matters which were or might have been litigated under the issues, and bind not only Citizens Gas and Indianapolis Gas but also all their successors in title and privies in interest, including City as successor Trustee.

The judgment is conclusive upon all defendants in the present cause that the lease is valid and enforceable against all parties thereto and their "successors and assigns." City is therefore denied no right of due process by failure of the court to order a further hearing upon this issue of burdensomeness already conclusively adjudged.

WILLIAMS v. CITIZENS GAS COMPANY, 206 Ind. 448

(Brief, pp. 51-55.)

Williams brought suit, as a beneficiary of the public charitable trust, against all parties to the present cause and also the Public Service Commission. He urged a judgment cancelling the lease upon grounds that its terms were excessive and burdensome upon the trust and that its execution was *ultra vires* Citizens Gas. All defendants, including City, contested said action and upon their securing judgment, plaintiff appealed. The opinion of the Supreme Court declared the lease to be valid, one which the contracting parties had power to make and one which the Commission had power to approve. The opinion held that obligations of Citizens Gas as a Trustee to the beneficiaries of the public charitable trust were subordinate to those it had as a public utility under the laws controlling and regulating such utilities.

Evidence of the pleadings, issues and determinations in both the Fishback and Williams cases was before the District Court under the issue as to whether said judgments, or either of them, were *res adjudicata* of the issues of the present cause.

The judgment in the Williams case conclusively determines every issue presented by City in this cause as to every party thereto, both *as a declaration of the law of Indiana* and as *res adjudicata.*

City, bound by the order of the Commission holding the lease provision fair and reasonable and by the judgments of two causes declaring the lease valid, is not now deprived of any right of due process by failure of Circuit Court of Appeals to order a fourth hearing on the alleged issue of burdensomeness of the lease.

3.

Both City and Citizens Gas Are Precluded by Laches From Now Asserting Lease is Invalid Upon Any Presented Issue.

(Brief, pp. 56-61.)

City, as successor trustee, may not now assert that the lease is invalid for any reason after the leasehold has been accepted and utilized by the trust and predecessor trustee for a period of 22 years. Such a delay in the assertion of alleged rights constitutes such laches as precludes the granting of the relief sought.

Neither a city nor an individual may accept all the benefits of a contract for 22 years, during which time it

twice defended the same from attacks on its validity, and then, at the expiration of such a period, seek avoidance of its obligations thereunder upon the ground that the consideration either has become or had always been burdensome.

Being precluded by laches from presenting the alleged issue of burdensomeness, City was deprived of no right of due process by the judgment of the Circuit Court of Appeals.

IV.

The Ninety-Nine Year Lease Was Properly Held To Be Valid and Enforceable According to Its Terms Against the Trust, Citizens Gas Former Trustee, and City as Present Trustee.

(Brief, pp. 62-77.)

The power of Citizens Gas to execute the lease is granted in its charter by its incorporation as a public utility under the general laws of Indiana. By no other means than by purchase or lease could it have acquired property with which to perform its corporate purpose of supplying gas to all inhabitants of the City of Indianapolis.

The Public Utility Act of 1913 also gave express power to Citizens Gas as a public utility to execute the lease upon order and approval of the Commission, which it had. Such powers, were not in any degree diminished or affected by the fact that it held its property in the capacity of a trustee of a public charitable trust.

The leasehold when created became part and parcel of the trust *res*.

City had statutory authority to succeed Citizens Gas as trustee of the trust and to take over all its said property "subject to its legal obligations." By the City and Town Act of 1905, power was granted Cities to receive gifts and public trusts and become bound by their conditions and terms. By Chapter 77 and 78 of the Acts of 1929, drafted by the City itself, it was authorized to take over this particular trust and lease and perform all the provisions of the same. It provided that while City should accept said property subject to those obligations, they were only to be a charge upon the property itself and not upon the taxing powers of the municipality.

All acts done by City in succeeding to trusteeship were in compliance with statute, *except* its attempted refusal to accept the legal obligations of its predecessor trustee under the lease.

In succeeding Citizens Gas, City could not accept the trust in part and reject in part. Its acceptance of the trust was in its entirety, including the leasehold.

That City did not sign the lease in 1913 offers it no support. Citizens Gas was at that time sole trustee and empowered to secure for the trust the leasehold. City had not then elected to exercise its rights of succession and it was not known until 1929 that it would do so.

Sections 85 and 254, Chapter 129 of Acts of 1905 are not relevant to any present issues. These relate solely to contracts executed by a city which create a direct liability on the taxing powers of the municipality. Had they purported to relate to such obligations as are incident to the present lease, which they did not, the subsequent Acts of 1929 would have superseded and repealed them.

CITY'S INDEMNITY AGREEMENT

Upon accepting the property of Citizens Gas, City executed an agreement of indemnity to its grantor covering all liability, resulting from any acts of commission or omission of its grantor, and undertook to save it harmless.

This agreement, in view of admitted liability of Citizens Gas under the lease, renders City bound for those obligations even though it had not, as it contends and respondent denies, accepted the assignment of the lease together with the transfer of the other property of the trust.

City's objections to the judgment of the Circuit Court of Appeals are, therefore, without substance.

V.

Decision of the Circuit Court of Appeals Is in Complete Harmony With the Statutes and Decisions of the Courts of Indiana; and the Rule of Erie Railroad v. Tompkins Is in No Wise Violated.

(Brief, pp. 77-79.)

Had the decision rested solely upon *res adjudicata* of the presented issue by the decisions of the Fishback and Williams cases, or on grounds of estoppel, no valid objections could have been raised.

By the law of Indiana, estoppel against a City is denied only where the acts on which it is based are those of an officer or agent which are unlawful or without the scope of authority.

Here, all acts of the City upon which estoppel can be predicated were expressly approved by statutes, and the sole conduct of City which is in violation thereof is its refusal to admit acceptance of the entire trust property subject to its legal obligations.

The Court of Appeals did not rest its decision upon *res adjudicata* or *estoppel* but upon an independent judgment of liability guided and controlled by the decisions of Indiana and the settled interpretation of its statutes.

The decision is in entire harmony with the law of the State of Indiana.

VI.

Present Contentions of City Would Make the Public Charitable Trust Invalid and Fraudulent as Against Creditors, and Thus Violate Decision in Todd v. Citizens Gas.

(Brief, pp. 79-81.)

Under decision in Todd v. Citizens Gas, City had right as successor trustee to succeed Citizens Gas and accept all its property subject to all legal obligations and so operate the "continuing trust."

City contends that it may take part or all of said trust property, free from any charge for the payment of its liabilities, by itself retiring all capital stock of Citizens Gas by paying directly to stockholders their investment plus interest at 10% for the 25 years, leaving the company wholly without assets. Such a construction of the trust or the rights of a successor trustee, were it possible, would render the trust itself invalid.

It is provided by Indiana statute that all deeds or conveyances made in trust for the use of the grantors shall be void against existing or subsequent creditors. Any trust which would purport to have authority to abrogate its liabilities upon the succession of a trustee would be void.

VII.

Circuit Court of Appeals Properly Refused to Order Judgment in Favor of Chase for Interest on Unpaid Bond Interest at More Than Five Per Cent Per Annum.

(Brief, pp. 82-83.)

The unpaid interest coupons sued upon recite that the bonds bear interest at the rate of 5% per annum. Under the Indiana statute bondholders are entitled to interest on unpaid bond interest only at the contract rate. The statute provides that 6% shall be allowed only in the absence from the contract of a specified rate of interest.

The coupons, showing on their face that they are interest at 5%, preclude merit to the cross-petition of Chase seeking an increase in the amount of the judgment.

E.

ARGUMENT

It being a settled rule of this Court, in the consideration of causes the review of which is accepted by certiorari, that it will confine itself to the grounds upon which the writ was asked or granted, argument will here be made only as to such grounds.

I.

The Circuit Court of Appeals Did Not Impose Any Obligation or Burden Upon the City's Revenues Raised By Taxation But Merely Imposed an Obligation Upon the Trust Property and Upon the City as Trustee.

In the fourth reason, relied upon by City for allowance of the writ (Petition p. 16) it is erroneously stated that an important public question is involved and that by the judgment of the Circuit Court of Appeals there is imposed upon City, as a municipal corporation, a continuing obligation for 77 years to pay in the future the total amount of more than 45 million dollars, and that the payment of this obligation is not limited to the revenues arising from the operation of the plant but is also a burden on revenues raised by taxation. The direct contrary is true.

The obligation of the City, resulting from the judgment of the Court of Appeals, is one solely against it as the present trustee of the public charitable trust and operates only as a charge upon the property belonging to the trust

which it has taken over. The language of the Court's opinion (IV R. 1306) and the decree (IV R. 1307) demonstrate this fact. Both state that the judgment is enforceable against "The City as successor Trustee and the Trust property."

All actions taken by the City, relative to the gas system, since its succession to Citizens Gas under statutory authority, have been as a trustee and entirely separate and distinct from its governmental functions as a municipal corporation. In the issuance of the City's revenue bonds it was expressly provided that the payment of their principal and interest was solely a charge upon the revenues derived from the operation of the gas system and should not be an indebtedness of the City payable out of taxes (III R. 826; offered II R. 327).

The decision thus follows the express statute (Indiana Acts of 1929, Chap. 78, Appendix C) providing that the City might accept trusteeship of the trust here involved and that in accepting the transfer and conveyance of said property

> "The title to such property shall vest in such town or city subject to all outstanding legal obligations of such corporations: *provided, however*, that such town or city shall not be liable for any such obligation and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or any lien or encumberance executed by the board of directors, trustees, or other authorized officers of such corporation before such transfer *shall continue to be a lien* on such property to the same extent as before such transfer or conveyance."

The City in its brief uses certain figures as argument to destroy the obligations of the trust. The value of the property of Indianapolis Gas as stated in the circulars, under which the City's revenue bonds were sold to the public, was set at $12,730,490 as the cost of reproduction new and at a depreciated value of $9,181,960 (I R. 196; offered II R. 327). The figure of $45,000,000 used by the City is purely a mathematical computation with the accuracy of which we are not here concerned. That the interest on $10,000,000 at 5% per annum will total $10,000,000 in 20 years has no relevancy either to whether the rate of 5% is a lawful rate of interest or whether the obligation was validly assumed.

The statement of City therefore, that an important public question is here involved, because of a judgment against it as a municipality which might presumably impose a burden on revenues raised by taxation, is wholly without foundation.

The principal question presented to the court in the review of these causes is whether or not the obligations of a trust, created by the original trustee in its corporate capacity as a public utility and acquiesced in by the trustee, the trust, and its beneficiaries for 22 years, may be avoided by a succeeding trustee solely by reason of such succession—said obligations furthermore being incidental to a leasehold estate created under express legislative authority by the public utility corporation acting as instant trustee (I R. 80); a leasehold which both the original trustee and the City had on two different occasions joined in successfully defending against charges of invalidity in representative actions by beneficiaries.

II.

The Circuit Court of Appeals By Its Judgment Correctly Decreed That the Obligation of Indianapolis Gas for Interest on the Bonds Was Secondary to the Liability of the Trust Property, the City and Citizens Gas; the Latter Being Principal Obligors. Jurisdiction Was Not Defeated or Affected By the Order of Liability Adjudged Against All Defendants.

Until October 1, 1913, the obligation of Indianapolis Gas to pay interest on the bonds was solely its own. On that date the 99-year lease was executed under authority of statute (Appendex A) and upon order of the Public Service Commission of Indiana (I R. 116-122; offered II R. 327). Thereupon Citizens Gas took over as lessee the possession and operation of all this respondent's property. By the terms of said lease Citizens Gas as lessee agreed and undertook to pay all interest on said bonds as it should become due (I R. 69, No. 21; offered II R. 327) and from 1913 until April 1, 1936 this obligation was fulfilled by Citizens Gas or its successor trustee the City.

The express agreement of the lessee, made for itself, its successors and assigns, including the City or any successor-trustee, to pay and discharge said interest obligations, was a valid and binding consideration for the leasehold estate thus created. The District Court in the trial of the cause held the lease invalid and entered judgment solely against this respondent in the sum of $1,032,150, the amount of the then unpaid bond interest.

The Circuit Court of Appeals properly reversed the District Court and ordered judgment entered against all defendants in stated order of liability.

The relation of this respondent Company to the obligation sued upon is analogous to that of an original mortgagor who has conveyed property subject to the mortgage, with an assumption by the grantee to pay and discharge the mortgage debt, only here the conveyance was for 99 years instead of in fee. Upon a default in such obligation the mortgagee may sue both the original mortgagor upon the debt and the grantee upon the undertaking in the deed. In such case, in Indiana as it is generally, the grantee is regarded as the principal debtor and the grantor as a surety. This accepted rule is stated in *Stanton v. Kenrick*, 135 Ind. 382, at 389, as follows:

> "One who, in a deed, assumes and promises to pay an encumbrance upon land as a part of the purchase price, becomes, by that assumption and promise, the principal debtor to the holder of the encumbrance, and liable to be sued himself for the debt in the first instance; and while the grantor remains bound for the obligation, yet, as between grantor and grantee, the former is surety and the latter principal."

See also

Ellis v. Johnson, 96 Ind. 377;
Higham v. Harris, 108 Ind. 246.

It has also long been a rule of equity that courts, having jurisdiction of the parties to controversies brought before them, will decide all matters in dispute and decree complete relief.

Pomeroy Equity Jurisprudence, Sec. 181;
Alexander v. Hillman, 296 U. S. 222-242;
Lincoln National Life Ins. Co. v. Pearman, 43 Fed. (2d) 163;
Carter v. Blaine County Inv. Co., 45 Fed. (2d) 643.

This respondent can find no valid ground for, nor reason to support, the contention of the City as to lack of jurisdiction. Interest on its bonds is unpaid and in default in a substantial amount; to deny such indebtedness to its bondholders or their right to enforce such obligation by lawful means would not serve the proper interests of any party to this cause. Indianapolis Gas being liable to its bondholders for more than $1,000,000 as adjudged by both the District Court and the Circuit Court of Appeals, and it being only through subsequent collateral contracts with the other defendants that its primary liability as debtor became that of a surety for the payment of said obligation, no valid reason can exist for realignment of Indianapolis Gas as a plaintiff to sue itself and the other defendants for a debt which it must pay if said other defendants do not. The jurisdiction of both the District Court and Circuit Court of Appeals was properly invoked in this cause, and the judgment of the Circuit Court of Appeals in determining the order of liability of the several defendants to the obligation sued upon was therefore proper and unassailable.

III.

The Decision of the Circuit Court of Appeals Directing Judgment Against All Defendants, Without Ordering Retrial of the Alleged Issue of Burdensomeness of the Lease, Did Not Deprive City of Any Constitutional Right of Due Process of Law.

City contends the decision of the Circuit Court of Appeals in ordering judgment against all defendants, without remanding the cause to the District Court for further hear-

ing on the alleged issue of burdensomeness of the lease, denies to it due process of law. City, in its answer and counter-claim below, alleged that the lease was burdensome upon the City and the property of the trust, and one which the initial trustee had no power to make for a period beyond its own trusteeship; and that it was not binding upon the City as successor trustee and did not constitute an asset of the trust which it was bound to accept. (I R. 186, 187.) A motion to strike out the allegations of burdensomeness as being immaterial and constituting no defense was filed by plaintiff and denied by the District Court and assigned as error above.

In its counter-claim against Indianapolis Gas and all other parties to the cause, City alleged that the validity of the lease had not been already adjudicated in the Fishback and Williams cases and that said lease did not constitute an enforceable obligation against either the City as trustee or the trust. (I R. 187.) Issue was joined by Indianapolis Gas upon said allegations. (I R. 215, 220.)

Before trial the District Court made the order (II R. 321-322) heretofore referred to, as set out in full at page 34 of City's brief. In the City's petition for rehearing filed with the Court of Appeals it sought and urged

> "an opportunity to prove the averments of its counterclaim and to have the lower court determine whether *when* executed *the lease was in fact* burdensome." (IV R. 1310.)

The above language of the petition for rehearing is also quoted at page 6 of the City's petition to this court for certiorari.

This reserved issue, as determined by the order and interpreted by the City in its petitions for rehearing and

for certiorari, was therefore simply whether the City had the right to "refuse and reject an assignment of the lease" in 1935 upon the alleged ground that in 1913 "when executed this lease was in fact burdensome."

That the judgment of the Circuit Court of Appeals was proper and did not deny to the City any rights of due process of law, through failure to remand to the District Court the cause for further hearing on that issue, is supported by each of the following reasons:

(1) City did not refuse and reject an assignment of the lease, but in fact received, recorded and retained said assignment and simultaneously took possession of the leased property and operated it for six months (until March 2, 1936) solely under authority thereof, and by ordinance expressly accepted the public trust of which the lease is part (III R. 1018, 1019). The reserved issue thus becomes moot.

(2) The fact that the lease was not invalid because of any burdensomeness upon the public charitable trust had been judicially determined by the Supreme Court of Indiana and by the Superior Court of Marion County, Indiana, and by the order of the Public Service Commission, in representative proceedings by beneficiaries on behalf of the trust itself, with the trustees in court, which order and adjudications are binding and conclusive upon both the original and successor trustees and the trust.

(3) Under decisions of Fishback and Williams cases any charge of burdensomeness would be wholly irrelevant as a matter of Indiana law.

(4) City and Citizens Gas having operated for 22 years under the lease, thereby greatly increasing the value of the trust, are now precluded by laches from any defense against an action on the lease by asserting the same is unenforceable on account of any alleged burdensomeness.

(1)

City Accepted Assignment of the Lease and Took Possession of the Entire Trust Property, Including That Under Lease, and therefore Any Alleged Ground for Not Accepting Such Assignment Becomes Moot.

The acts of the City on September 9, 1935, in succeeding to the trusteeship of the gas system, were only the culmination of an expressed and definite program and election which had been made and followed consistently for over six years. In defining the action of that date by Citizens Gas and City, it is therefore necessary to examine the City's expressed policy during the previous years. In every action and step, taken by the City preparatory to its succeeding Citizens Gas as trustee, is found a clearly expressed intention to take over the entire trust; the property which Citizens Gas had *operated* and in which it *had an interest*.

On March 20, 1929 the City, by resolution of its Board of Public Works (II R. 670 to 672, offered R. 327) first declared by formal action its election and purpose to exercise its right to succeed Citizens Gas as trustee of the public charitable trust. It there demanded of Citizens Gas "all rights, title, interest and ownership of whatever nature or character in and to the gas plant, mains and property" which it had. Demand was made that the latter company

secure by mortgage, if possible, sufficient sums to retire and redeem its common stock and preferred stock and then convey said gas system to the City "subject to such mortgage and other legal obligations against said company" (II R. 671). The property, so demanded, included the leasehold estate in the property of Indianapolis Gas which had been an integral part of the system operated since 1913. Said demand was made a few days after two statutes prepared by City authorizing the transfer went into effect. (Appendix C and D.)

The above resolution of March 20 was served upon Citizens Gas, whose directors by resolution of April 3, 1929 (II R. 672-673, offered II R. 327) acknowledged said demand and "the right of the City to take over the property and assets of said Company," and authorized its officers to comply therewith.

Following said resolution of March 20, the next step taken by City to succeed as trustee was action by its Board of Directors for Utilities on May 7, 1935. By resolution of that date (III R. 822-830, offered II R. 327), it authorized the City's gas system revenue bonds which should be issued and sold by the City in the amount of $8,000,000, principal and interest on said bonds to be payable from, and be a charge *only* upon the net revenues derived from operation of the gas system to be "owned and/or operated by" the City. At the beginning of the resolution it was stated the purpose of the bond issue was to obtain funds "for the taking over of certain property held by Citizens Gas Company and/or in which it has an interest." (III R. 822, offered II R. 327.) It also provided that the City agreed to take all steps necessary to acquire the property of Citizens Gas and that when the City had accepted "the possession of the property *operated* by Citizens Gas Com-

pany, it will cause the same to be continuously operated *as a gas system''* (III R. 828, offered II R. 327.) The form and tenor of the bonds so authorized was also set out in the resolution (III R. 825); and in the bond itself the purpose was stated in the exact language of the resolution quoted above.

Prior to the adoption of this resolution the Supreme Court of Indiana, by Judge Treanor, had decided the case of *Williams v. Citizens Gas Company et al.*, 206 Ind. 338 (Dec. 1933). In the light of that decision, holding that the lease was valid and a part of the trust estate, the description of the property as that "operated by" Citizens Gas "and/or in which it has an interest" was obviously intended to include the leasehold estate in the property of Indianapolis Gas.

In connection with the sale of its said revenue bonds, the City issued a prospectus to invited bidders in May, 1935 (II R. 533-536, offered R. 518). It was there stated that the City was to take over and operate the property of Citizens Gas "subject to outstanding obligations." It also included the following statement in describing the gas system:

> "For over twenty-one years, gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and 75,949 meters in use as of May, 1935."

Referring to the fact that the leased property included 531 miles of gas mains (I R. 196, offered II R. 387), the prospectus continued:

> "The system is in part owned by Citizens Gas Company and in part leased by it from Indianapolis Gas Company, which is not an operating Company. * * * The Citizens Gas Company owns approximately 40 per cent of the mains of the system", and that Indianapolis Gas owned approximately 60 per cent of the mains. (II R. 535, offered R. 518.)

The prospectus then continued with a statement descriptive of the details of the ninety-nine-year lease and of its terms and provisions (II R. 533-536, at 535; offered II R. 518).

Thereafter in July, 1935, in reliance upon statements in the prospectus, said City's revenue bonds were purchased by Halsey, Stuart & Company and Otis & Company, by whom they were later sold and distributed to the public. (II R. 486-488; offered II R. 420.)

By September 9, 1935, the City with the proceeds from the sale of its gas revenue bonds, had retired the common stock, preferred stock and bonds of Citizens Gas (II R. 634, 635; offered R. 326), and had performed other conditions precedent to its succession as trustee of the trust. No money was paid to Citizens Gas, the entire consideration being paid to stockholders and bondholders in the retirement of their stock and bonds, the stockholders receiving a sum completing full dividends of 10 per cent per annum for 25 years.

On this date of September 9, 1935, Citizens Gas executed and delivered to the City instruments transferring and conveying all the property of every kind and character owned by Citizens Gas, including the lease in question.

The four separate instruments then delivered to the City were:

(1) a deed covering all real estate owned by Citizens Gas (III R. 833; offered II R. 327);

(2) an instrument of transfer and assignment of its personal property (I R. 122-7; offered II R. 327);

(3) an assignment of the lease of property of Indianapolis Gas (I R. 127-9; offered II R. 327); and

(4) an assignment of the lease for space in an office building (III R. 835; offered II R. 327).

These instruments of conveyance, including the assignment of the 99-year lease, all expressly provided that they were made subject to all legal obligations of Citizens Gas. They were all received, recorded and retained by the City (II R. 330, 467-8). The City took immediate possession of all the property which had been operated by Citizens Gas, including that of Indianapolis Gas, and has thereafter continued the operation of the leased property as a unified part of the entire gas system.

Upon receiving said instruments of conveyance and assignment, the City, through its Directors for Utilities, passed its resolution for so-called "temporary use" of Indianapolis Gas property and its so-called "rejection of the lease." (I R. 202; offered II R. 432.) By these *ex parte* resolutions, City has since sought to nullify the express provisions of the instruments of conveyance and assignment it accepted, which provide that the property is transferred subject to the legal obligations of grantor; to annul all its acts during the six previous years, as well as the statutory provisions (Appendix C and D) authorizing and controlling its succession to the trusteeship and the trust, including this lease.

The City's right to the possession and operation of the property of Indianapolis Gas, which it assumed upon receiving the instrument assigning said lease, was solely by right of said assignment and as a successor-lessee under the lease. No consent was given by Indianapolis Gas to the City's so taking possession and assuming operation of the leased property. Three weeks later, on September 30, 1935, the City forwarded to Indianapolis Gas its check in the amount of interest falling due October 1 on its outstanding bonds, and stated that by so doing it waived no rights to claim that the lease was not enforceable against it nor did Indianapolis Gas, in accepting said check, waive its right to claim enforceability (III R. 968, 969; offered II R. 384-5). This money was accepted by Indianapolis Gas under these provisions of non-waiver and the bond interest was therewith paid.

It was not until March 2, 1936, that an agreement was entered into by the City and Indianapolis Gas under which it was provided that the City might continue to operate the property of Indianapolis Gas without prejudice to the position or rights of either party. It provided that during the life of the agreement the City should make deposits in escrow in a local bank of amounts equal to certain lease rentals, including the amount of interest on Indianapolis Gas bonds as it should become due (I R. 205 to 207; offered II R. 386). It also provided that said agreement should not constitute a waiver of any alleged rights of the parties under the lease (II R. 637; offered I R. 386).

Therefore, from September 9, 1935, until March 2, 1936, the City was in possession and operated the property of Indianapolis Gas under no authority or right other than as successor to Citizens Gas and assignee of the lease.

City, having thus taken possession and assumed operation of the entire gas plant, including the parts thereof which Citizens Gas had acquired both by purchase and by this lease (in compliance with statute, Appendix B), by its Common Council expressly enacted by ordinance:

> "That the public charitable trust in all such plant and property so delivered to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out." (III R. 1018, 1019; offered II R. 429, 430.)

Under the above narrative of uncontradicted evidence, admitted by stipulation of all parties, it is conclusive that the City, in fact and in law, did accept and retain the assignment of the 99-year lease and, as such assignee, did enter into the possession and operation of said leasehold estate as a part and parcel of the trust *res*, the unified gas system, it was taking over. It must follow that any alleged grounds which the City might have had for refusing to accept the lease can not be an issue which is pertinent to the cause, or one which is here other than purely moot.

(2)

That the Lease Was Not Burdensome Was Determined by the Public Service Commission, and That It Was Not Invalid Upon Such Ground Was Judicially Adjudged by the Courts of Indiana, Which Said Determination and Judgments Are Conclusive Upon the Trust and the City Its Present Trustee

A.

The Order of the Public Service Commission

When the ninety-nine-year lease was executed (I R. 80; offered II R. 327), the Public Utilities Commission Act, Chapter 76, Indiana Acts 1913, known as the Shively-Spencer Utility Act, was in force. This act placed upon public utilities certain obligations as to furnishing service and providing proper facilities, and it also granted them certain rights of purchase and lease of property of other utilities giving similar service in the same community; such rights to be exercised solely under the control and direction and with the approval of the Public Service Commission.

Six sections of this act are set out under Appendices A, G, H, I, and L in this brief. Section 95½ of said act (Appendix A) provided that:

> "any public utility may also, with the consent of the holders of three-fourths of the capital stock, purchase or lease the property, plant and business or any part thereof of any other public utility at a price and on terms fixed by the commission."

It was under the authority and provisions of this statute that the joint petition of Citizens Gas and Indianapolis Gas, seeking approval of the proposed lease and merger, was filed with the Public Service Commission. The City of Indianapolis, by its corporation counsel, participated (I R. 116; offered II R. 327) in the extended hearing had upon the petition. The lease was thus approved and ordered "at a price and on terms fixed by the commission."

In the course of the proceedings one Fishback, as a resident freeholder of Indianapolis and certificate holder of Citizens Gas and for the protection of the rights of all similarly interested (II R. 654, 656, 657; offered II R. 327), filed his intervening petition urging that the petition for approval of the lease be denied upon, among others, the following grounds:

> "First. The physical valuation and the earning capacity of the Indianapolis Gas Company are not such as to warrant the payment to it of the rental proposed to be charged the Citizens Company. (II R. 654.)
>
> * * * * * * *
>
> "Fourth. The Citizens Gas Company has no power to make a lease covering a period longer than the term of its existence. It not before, by dividends and interests, then at the end of 25 years the certificates of stock are to be cancelled and the corporation wound up. (II R. 656.) * * *
>
> "I contend that the Citizens Gas Company is without power to make lease binding on the City of Indianapolis for a period of 74 years after the company goes out of existence." (II R. 657; offered II R. 327.)

After a protracted hearing, the Commission on October 1, 1913, made its finding and order approving the lease with certain modifications, among which was the reduction of rent paid to common stockholders of Indianapolis Gas by way of dividends, from 7% to 6%. In the course of its finding and order the Commission stated:

> "The two plants are so constructed and laid out as to adapt the two to a single working plant of great efficiency, and under one management they can be operated at a great saving as compared with the cost of operating them as separate and competitive plants.
>
> "The valuation of the Plant of the Indianapolis Gas Company is, in the opinion of the Commission, sufficient to justify, under the circumstances, a rental such as is proposed in the subjoined lease." (I R. 117-118; offered II R. 327.)

Following the order of October 1, Fishback filed his petition for rehearing, contending among other things:

> (3) "The rental ordered and permitted to be paid by the terms of the order and lease, is unreasonable and unlawful, and will result in a waste and misapplication of the funds, earnings, and property of the Citizens Gas Company, and an irreparable injury to its stockholders and certificate holders." * * *
>
> (5b) "The trustees and directors and officers of the Citizens Gas Company are not authorized by law or otherwise to enter into such a lease for a period of ninety-nine years." * * *
>
> (6) "The fulfillment of the terms and conditions of the lease and order will render impossible the fulfillment of its contract with the City of Indianapolis, and such order and lease im-

pairs the obligation of the contract between the company and said City as it relates to the taking over and ownership of the property and plant of the Citizens Gas Company by the City."

(7) Consent to the lease had not been given by the City.

(9) The order of the Commission was contrary to law. (II R. 659-660; offered II R. 327.)

On November 28, the Commission denied said petition for rehearing (II R. 660-663), and thereupon Citizens Gas took possession of the plant and property of Indianapolis Gas, which it continuously operated thereafter under said lease until September 9, 1935, when it conveyed and assigned to the City all and singular of its property, including the leasehold, subject to its legal obligations (I R. 122-127; III R. 833; offered II R. 327).

The decision of the Commission, under the settled law of Indiana, is conclusive in this collateral action upon the questions of fact as to whether the lease or merger was in the public interest and a proper and reasonable exercise by Citizens Gas of its powers as trustee of a public charitable trust, which was at the same time a public utility amenable to the laws of the state controlling such utilities. It is also conclusive as to the fairness and reasonableness of the rental and length of term provided in said lease, both of which were expressly committed by the statute to determination by the Commission.

Citizens Gas, in a memorandum on admissibility of certain evidence filed with the District Court in the trial of these causes, stated in discussing the order of the Public Service Commission:

> "The order expressly found that the execution of the lease and the merger did create greater efficiency and procure the operation at a great saving. Moreover, the order of the Commission must necessarily have been based upon the conclusion that the making of the lease and merger were in the public interest; and, furthermore, was in fulfillment of the duties of Citizens Gas Company as a public utility."

The order of the Commission is, furthermore, not subject to collateral attack in the courts except upon the ground of fraud, and it is to be noted that no attack has been made by the City, either in the trial of these causes or in any prior litigation, upon the motives or the judgment of either the Directors and Trustees of Citizens Gas in making the lease, or of the Public Service Commission in ordering the same. No suspicion of fraud has ever been alleged or intimated by the City in connection with these proceedings.

The rule announced by the Supreme Court of Indiana in *Public Service Commission v. City of Indianapolis*, 193 Ind. 37, 43, has never been qualified and is now the settled law of Indiana. It is stated in the opinion at page 43:

> "If the Commission had jurisdiction and kept within it, and its action was not vitiated by fraud, its decisions of all questions of fact as to the value of the properties, the sufficiency of the income to pay interest and dividends on the bonds and stock authorized, the petitioner's qualification as a purchaser, and all other questions which it was required to decide as preliminary to taking action in the matter, is conclusive on the courts in a collateral action."

City at pages 70 and 71 of its brief accepted the above announced rule as to the conclusiveness of the Commis-

sion's order upon the reasonableness of the lease terms and that it was made in the public interest. The order applied to a public utility. How it could be in the public interest and at the same time not in the interest of the beneficiaries of the trust (the public) is not explained.

As a defendant in the Williams case, City filed in the trial court a joint motion with Citizens Gas to strike out parts of the complaint and there urged as reasons therefor:

> "First. These subdivisions of the plaintiffs' complaint challenge a lease executed by Citizens Gas Company and Indianapolis Gas Company and approved by the Public Service Commission of Indiana. The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities and it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that Commission can not be collaterally attacked." * * * (II R. 806; offered II R. 328.)
>
> "Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same." (II R. 807; offered II R. 328.)

The jurisdiction of the Commission to authorize execution of the lease is clearly established, and in view of the above and controlling law of Indiana defining the force and effect of orders of the Commission, it follows that the City may not collaterally attack the order and findings of the Commission in this cause by now alleging and seeking to prove that "when executed this lease was in fact burdensome."

Being deprived by law of the right to now present the issue of burdensomeness, the refusal of the Court of Appeals to remand the cause for further hearing on this issue did not deprive petitioner of any rights of due process of law.

B

Fishback v. Public Service Commission, 193 Ind. 282

Immediately upon denial by the Public Service Commission of his petition for rehearing and its order approving the lease, Fishback instituted suit in the Marion Superior Court of Indiana as a resident freeholder of the City and certificate holder of Citizens Gas in behalf of himself and all others so interested.

The purpose of the action as defined by the Supreme Court was:

> "to vacate and set aside an order of the Public Service Commission authorizing the Citizens Gas Company to lease the plant and property of the Indianapolis Gas Company for a period of ninety-nine years, and to operate it with its own plant and property as part of a consolidated system. The action also sought the cancellation of the lease made by authority of the order, and an injunction against appellees, the two gas companies, to prevent them from carrying out the provisions of the order." (193 Ind. 282, at 283-4.)

Citizens Gas, Indianapolis Gas, City of Indianapolis, and the Public Service Commission were defendants (II R. 648; offered II R. 328). The complaint set out the articles of incorporation of Citizens Gas (650), its franchise contract with the City (651), and the form of its trustee certificates (649). Thus before the court were all the instru-

ments which spelled out the Public Charitable Trust, and as a resident freeholder of Indianapolis suing for all others, the plaintiff was necessarily suing as a beneficiary of that trust and for all other beneficiaries.

The complaint alleged, among others, the following grounds to support the relief prayed for (II R. 648-668; offered II R. 328):

a. "The rental and fixed charges ordered and required to be paid by the terms of the lease and order as hereinbefore set forth are unreasonable and unlawful and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company and an irreparable injury to its stock and certificate holders, including plaintiff." (II R. 665)

b. "The trustees, directors and officers of Citizens Gas were not and are not by law or otherwise authorized to enter into such a lease as hereinabove referred to for a period of 99 years." (II R. 668)

c. That City did not consent or join in the execution of the lease (II R. 665).

d. "The obligations taken on by Citizens Gas Company under said order and lease, to pay the interest on the bonds and dividends on the stock of Indianapolis Gas Company for a period of ninety-nine years, impairs the obligation of the contract existing between the Citizens Gas Company and this plaintiff and other stockholders, and between the company and the City of Indianapolis, in the following particulars:

"1. It constitutes such a lien and incumbrance upon the property and earnings of said company, that the company at the end of twenty-five years from the date of its franchise, can not

> mortgage such property for the purpose of raising funds from which to pay the stockholders of said company, including this plaintiff, the par value of the stock held by them and the balance of the unpaid accumulated ten per cent annual dividends." (II R. 665-666) (Offered II R. 328)

Defendants, including the City, filed motions to strike out parts of the complaint (II R. 624; offered II R. 327), which motions were in part granted and in part denied. Thereafter demurrers to the complaint were filed by Citizens Gas, Indianapolis Gas and Members of the Public Service Commission, while an answer in general denial was filed by the defendant City. (II R. 625)

The demurrers were sustained and, the plaintiff refusing to plead further, final judgment was rendered (after suit had pended for seven years, II R. 625) in favor of all defendants except City (II R. 625), as to which plaintiff dismissed on the day of judgment (II R. 624-627; offered II R. 326). The attempted appeal by plaintiff was dismissed by the Supreme Court of Indiana and it has been stipulated by all the parties to this cause that the judgment of the Marion Superior Court is *now in full force and effect*. (II R. 626; offered II R. 327).

It is the settled rule of Indiana, as it is generally, that the final determination of a matter by a court having jurisdiction forever sets at rest the questions determined and also every other matter which might have been litigated under the issues in the case, as between the parties and those in privity with them.

> *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 361;
> *Knox v. Clark County Co.*, 191 Ind. 354, 365;

Reynolds v. Lee (1935), 97 Ind. App. 460, 463;
Grantham Realty Corp. v. Bowers (1939), 215 Ind. 672, 678-679;
Citizens Loan & T. Co. v. Sanders (1934), 99 Ind. App. 77, 82, 83;
So. Pac. Ry. Co. v. U. S., 168 U. S. 1, 48.

For a judgment is binding not only upon the actual parties to the judgment but upon all who succeed them and are their privies in interest.

Skelton v. Sharp, 161 Ind. 383, 386, 387;
Grantham Realty Corp. v. Bowers Jr., 215 Ind. 672, 678, 679;
Vinson v. Graham (C. C. A. 10), 44 Fed. (2d) 772, 775-776.

The suit, being a class suit and brought by plaintiff as a resident of Indianapolis and for all others so situated, they being beneficiaries of the trust, the judgment entered therein must necessarily be binding upon not only the then trustees but all succeeding ones, and the trust itself.

Burns' Rev. Ind. Statutes 1933, ss. 2-213, 2-220.

Indianapolis Gas and Citizens Gas were both parties to the judgment and as to them, and those in privity, the judgment must be conclusive of the decided issues, viz., that

(a) The lease was not made invalid because of the alleged burdensomeness.

(b) Citizens Gas had power and authority to enter into the lease, and the trust with all beneficiaries are bound by it.

(c) The lease was not invalid because of the findings and order of the Commission not being

sustained by sufficient evidence or binding at law.

City contends that, by reason of dismissal as to it just prior to judgment, it is not now bound by the judgment. This contention overlooks the admitted facts that the trust itself was a party to the judgment in the person of the then beneficiaries and the then trustee, Citizens Gas, and that thereby the trust and its beneficiaries and trustees, then and in the future, are bound; and that the City was a party to the proceedings until the day of judgment and had joined issue by filing its denial of the allegations of the complaint averring that the rentals of the lease were excessive and in substance burdensome upon the trust. The opportunity was given it to join the plaintiff in claiming the lease invalid on the ground set out in the complaint. Had it joined issue with Indianapolis Gas, its then co-defendant, by a counter-claim alleging the invalidity of the lease for any reason, it could readily have precluded its dismissal on the day of judgment. It had been in court for seven years and the issues were presented to it which it accepted by its answer of denial. It may not now contend that the issues, which it has itself raised by its counter-claim in the cause now at bar, were not in their entirety presented to and accepted by it there.

However, had the City not been a party at any stage in the proceedings of the Fishback case, it would be as equally bound by the judgment therein as is Citizens Gas. It is axiomatic that an adjudication of title is binding, not only upon the owners at a particular time who were parties to the judgment, but also upon all those who subsequently acquire title under and through them.

Grantham Realty Corp. v. Bowers, 215 Ind. 672.

Were the rule otherwise, titles either of fee or leasehold estate might never be quieted by judgment for a period longer than the life of the particular owner, lessor or lessee who might be party to the judgment. Not only was Citizens Gas bound by this judgment, by which it sought to quiet its title in the leasehold estate, but also the City or any other successor trustee who might have become its grantee and assignee is bound, especially when taking "subject to all legal obligations" of the grantor.

City also contends that the binding effect of that judgment is not conclusive upon the parties to this cause by reason of the fact that Chase, the present trustee and representative of the bondholders of Indianapolis Gas, was not a party to that proceeding. It is true that neither the Chase bank nor its predecessor trustee nor any other creditor of Indianapolis Gas was a party to the Fishback suit. However, their presence or absence from that cause could in no wise diminish the conclusive effect of the judgment that, as between the trustee of the public charitable trust, the trust itself and this respondent Indianapolis Gas as well as their successors and assigns, the lease was a valid and enforceable obligation for its term and according to its tenor.

Issue in the instant cause was definitely joined in the District Court as to whether or not the matters presented and decided in the Fishback case were or were not controlling as between Indianapolis Gas, Citizens Gas and City in the present determination concerning the validity of the lease (I R. 10, 11, 14, Sec. 9, 14; I. R. 151-153, 159-161, Sec. 14; I R. 220).

It is submitted that the City may not now assert, as against this respondent, that the lease is invalid and unen-

forceable for any reason or on any ground which it has alleged in its counterclaim. It may not now collaterally attack either the judgment in the Fishback case or the order of the Commission by relitigating the question whether the lease is burdensome.

This decision of the Superior Court in *Fishback v. Public Service Commission* is conclusive in determining what is the law of Indiana.

West v. American Tel. & T. Co., 85 L. Ed. (adv.) 146;

Fidelity Union Trust Co. v. Field, 85 L. Ed. (adv.) 176.

It clearly determined that none of the objections urged by Fishback as a beneficiary on behalf of the trust estate were well taken under the law of Indiana and that the order of the Public Service Commission approving the lease in question "at a price and on terms fixed by the Commission" was valid and binding.

City is, therefore, deprived of no right of due process by the failure of the Circuit Court of Appeals to order this cause remanded to the District Court for further hearing upon an alleged burdensomeness of the lease.

C.

William v. Citizens Gas Company, 206 Ind. 448.

Allen G. Williams and another were suing in this action as beneficiaries of the public charitable trust, in behalf of all beneficiaries, and seeking to have the lease declared invalid on the ground that the order of the Public Service Commission approving the lease was invalid, that

the lease itself was burdensome upon the trust, and in effect upon allegation of every ground which has been alleged by the City in this present cause, either in answer to the complaint or in its counterclaim against this respondent and others (II R. 761 to 803; cf. R. 141 to 187; offered II R. 328).

All of the parties to the cause now at bar were parties to that litigation, and every issue presented here was in issue there and was put at rest by the final judgment in that cause. In statement of facts already before the Court is a full and detailed discussion of the pleadings, issues and matters determined in Williams v. Citizens Gas (II R. 630-633; offered R. 326; also R. 761-822; offered II R. 329). To re-state them here is unnecessary. With what is said in the Chase brief as to the effect of the Williams judgment, this respondent is in accord. It is submitted that the judgment in the Williams case is conclusive of all matters here presented, both *as a declaration of the law of Indiana* and as *res adjudicata*.

City contends in substance that it is not bound by that judgment for the reason that it had not become trustee of the public charitable trust at the time the judgment was entered, and also that it is not bound because of a change of conditions which has occured since said judgment. These contentions are purely fatuous. The City in fact had adopted the resolution and given notice that it was exercising its right to take over the trust on March 20, 1929 (II R. 628 (12), 670; offered II R. 327) before Allen G. Williams, et al., commenced their suit as beneficiaries under the trust on March 12, 1930 (II R. 630 (14), offered II R. 327). The only subsequent change which occurred in the administration of the public charitable trust was simply the substitution of the City for Citizens Gas as trustee of

such trust and the transfer of the legal title. An obligation of a trust, validly created by its then trustee, is in no wise affected by a change of trustees which may occur either through death, resignation, removal or assignment. The statement in the opinion of the Circuit Court of Appeals is obviously correct:

> "If the lease is valid, the rental obligation binds the trust *and it matters little that a new trustee succeeds the old one.* Otherwise any obligation incurred by a particular trustee would cease with the death, resignation or removal of that trustee: such a rule would lead inevitably to ridiculous results."

The rule as stated is a basic one underlying the successful functioning of all trusts and no authority has been cited by City, nor can any be found, holding otherwise.

In bringing the representative suit, Williams, et al., were acting for all beneficiaries of the charitable trust, as was expressly provided by the Indiana Statute:

> Burns Ann. Indiana Rev. Stat. 1933, sec. 2-213, 2-220;

See also:

> *Gaiser v. Buck*, 203 Ind. 9, 11, 13;
> *Siegel v. Archer*, 212 Ind. 599;
> *Englehart Estate v. Larimer*, 211 Ind. 218.

In *Siegal v. Archer*, 212 Ind. 599, it is stated at page 626:

> "One or more beneficiaries of a trust could sue on behalf of all to test the binding and valid force of a contract entered into by the trustee affecting the entire trust and making the trustees parties defendant; and where the trustees (as here) actively

> joined in the defense of such suit on the merits and procurred the court to sustain a demurrer to the complaint on which final judgment was rendered against such plaintiff beneficiaries by which the contract was adjudged valid, such judgment against the beneficiaries is binding upon the trustees who were thus made parties to the action."

Had any doubts remained after the judgment in Fishback v. Public Service Commission as to the validity of the lease, such doubts were forever put at rest by the decision in this Williams case. All clouds upon the title of the trust to this leasehold estate were removed and it was, and should be, conclusive for all time that the lease is valid and enforceable against all parties to the lease, their successors and assigns, and against the *res* of the public charitable trust. This final decision in Williams v. Citizens Gas Company, 206 Ind. 448, of the Supreme Court of Indiana became and is the law of Indiana upon the subject and is binding upon all parties and, under the rule of this court as announced in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, also upon courts of the United States.

Therefore, by reason of the order of the Public Service Commission finding that the terms of the lease were in all respects reasonable and beneficial to the trust and approving its execution; by reason of the judgments in both Fishback v. Public Service Commission, et al., and Williams v. Citizens Gas Co., et al., it necessarily results that the City is precluded in this action from defending against the lease obligations upon the ground that "when executed this lease was in fact burdensome."

City would seem to argue at page 39 of its brief that it was denied the right to present proof in support of allegations in its counterclaim that the order of the commis-

sion and the judgments in the Fishback and Williams cases were not res judicata. This is denied by the record. Not only were these issues not reserved in the pre-trial order of the District Court, but as the trial progressed, evidence was introduced by stipulation of the parties (Exhibit 1, II R. 613-639; II R. 648-668; offered II R. 326-7-8) describing the pleadings in the Fishback case and what issues were joined and what the judgment was (II R. 624-627; offered R. 327). By a like stipulation evidence to the extent of 61 pages (II R. 761-822; offered R. 328) was heard descriptive of the pleadings in the Williams case and 3 pages more (II R. 630-633; R. 327) describing the issues, decision and judgment were all introduced in evidence. Furthermore, City requested of the District Court the adoption of special findings of fact and a conclusion of law that it was not bound by the adjudications in the above cases (III R. 1089-1092; 1102) which requests were acted upon and adopted by the trial court and written into paragraph two of the decree appealed from. (III R. 1175-1179, 1190-1192).

The City was therefore fully heard in the District Court as to whether or not the several judgments pleaded were *res judicata* of the enforceability against it of the lease.

City has had its day in court on three separate former occasions, and again in the case at bar by cross-complaint, answer, scores of pages of evidence, special findings and conclusions of law relative to such order and former adjudications. Its present contention that due process has been denied to it in this cause is wholly without substance.

(3)

Both City and Citizens Gas are precluded by laches from now asserting, after acceptance for 22 years, that the lease is unenforceable or invalid according to its terms and provisions.

Had the litigation of the Fishback and Williams suits never been instituted or carried to judgment; *aside* from the representations made since 1913 by Citizens Gas in the sale of Indianapolis Gas bonds in the principal amount of approximately $2,000,000, that the interest of said bonds was guaranteed by Citizens Gas; *aside* from the statements of the City made in its election to succeed Citizens Gas as trustee of the trust; *aside* from the express provisions in the instruments of conveyance and assignments under which City accepted the property subject to all liabilities of its predecessor trustee; and *aside* from the statements made to the purchasers of its revenue bonds, upon which they relied, that the trust property included a leasehold estate forming a substantial part of the gas system they are to operate; — ASIDE from and ignoring all of these former proceedings, statements and actions, the question is presented whether City, succeeding trustee, could now for the first time after this period of the trust's acquiescence in the lease and use of the leased property, assert that the trust is no longer obligated to the undertakings there set out on the ground that the lease was or is burdensome, and seek the aid of equity to that end. This respondent contends that the answer must be in the negative.

No principal of equity has been longer or more firmly established than the one of laches which denies relief to a party when the seeking of that relief has been unreason-

ably delayed and where, after a period of acquiescence in the alleged wrongs, such changes have occurred which render the granting of such relief inequitable and contrary to the public policy.

We have seen that City in this cause is before the court solely as trustee of the trust and that it stands in the shoes of Citizens Gas, its predecessor. As such trustee it holds such rights and is subject to such liabilities as were those of its predecessor. The change in administrators of the trust has neither added to nor detracted from the rights or liabilities of the trust, and in the discussion of laches, as precluding the relief here sought by the present trustee, no distinction can properly be made between Citizens Gas and City.

In the twenty-two years during which the trustee has operated the leased property and acquiesced in the lease, it has extended the mains of the leased property in such manner and in such directions as it itself alone determined subject only to a limited control exercised by the City as a municipality. Since 1913 Indianapolis Gas has been a non-operating company with no control over its property or power to maintain it in the relative competitive position with that of the property owned in fee by the trust such as existed at that time (II R. 622, 3; offered R. 326).

It can not be supposed that the local group of Indianapolis citizens would have seriously entertained the request of Citizens Gas that it purchase the capital stock of Indianapolis Gas to enable a lease to be executed if the lease were to mean a unified operation for only twenty-two years. No utility would surrender its property to the complete control of its competitor to be operated as its competitor saw fit for only twenty-two years and then to be returned, and no business man would invest in property about to undergo

such a future. No surer way of self annihilation could be conceived. Certainly no such arrangement was in the contemplation of the Commission when it ordered and approved the lease in this case.

After accepting all the benefits incidental to a unified operation of the gas system without competition, the trust now seeks discharge from the obligations incidental to said lease upon the ground that "when executed this lease was in fact burdensome."

In Indiana, as it is generally, a party who has entered into a contract without fraud can not defend against the obligations thereby created by reason of the fact that in subsequent course of events the consideration moving from one party may, either in the opinion of that party or in fact, have become burdensome. No party to a contract may be relieved of obligations created thereby simply because he subsequently believes that his bargain was not so advantageous as he had supposed when entering into the agreement.

In *Mullins v. Hawkins*, 141 Ind. 363, at 366, the court states the rule:

> "Where a party voluntarily and without fraud or deception enters into a contract and receives all he contracted for, he can not be relieved on the ground of inadequacy or want of consideration."

Neither law nor equity will inquire into the adequacy of bona fide consideration after it has been accepted and utilized for over twenty-two years.

In *Hoyt v. Latham*, 143 U. S. 553, at 567, this court spoke as follows:

> "In cases of actual fraud or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the *cestuis que trust* have ample notice of the facts, *they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation.* As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefitted by a raise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benfit of a possible rise."

City, when previously defending the lease before the Supreme Court of Indiana, in the Williams case, stated:

> "19. The lapse of seventeen years without action by the inhabitants and tax payers of Indianapolis to challenge the validity of the lease is such *laches* as to preclude the granting of the relief here prayed for." (III R. 954; offered II R. 420).

and also

> "But appellant ignores the transactions of seventeen years during which the Citizens Gas Company has openly held possession of the leased property and seeks to wipe out the very existence of the lease without any regard to the equities of the interested parties, yet that lapse of time constitutes such *laches* as to preclude equitable relief." (III R. 961; offered II R. 420).

Therefore, aside from all other considerations, City is now precluded by *laches* from seeking avoidance of the obligations of the lease upon alleged grounds that it is burdensome. For this additional reason no merit supports City's contention that it has been denied due process of law by failure of the Court of Appeals to remand the cause for further hearing upon that alleged issue.

Apart from all the above considerations of the issue of alleged burdensomeness of the lease, that it should be raised at all in this cause is amazing.

It will be noted that from a plant represented in 1913 by $1,250,000 of stock and $1,247,000 of bonds (II R. 609, ll. 15-34; offered II R. 420, 564) Citizens Gas had grown in the 22 years of joint operation of the combined property to own in fee property of which the reproduction cost was appraised at $17,607,310 and the "depreciated physical value" at $13,431,230 (I R. 196; offered II R. 327).

Under its operation of the entire system by virtue of the lease and being relieved of burdensome competition, the City was enabled as trustee to issue and sell to the public bonds in the amount of $8,000,000 (II R. 486; offered II R. 420) *all without the security of any mortgage on the gas property, without being a charge in any way upon the taxing powers of the City as a municipality,* and *dependent for the payment of both principal and interest solely upon the net revenues of the gas system.* This in itself is high tribute by public opinion to the earning capacity of the gas system, 62% of whose mains were operated under the lease. (I R. 195, 196; II R. 535; offered II R. 359).

When it is further recalled that this public appraisal of these bonds was founded upon and they were sold in reliance on the statements of City in its prospectus for bids (II R. 533 to 536): as to the rentals required under the lease to be paid and what had actually been paid the year before (1934), and upon representation that the leased property was a part of and would continue to be a part of the gas system for the duration of the lease, whose terms and provisions were in detail described, — the allegations in City's pleadings of burdensomeness, made only a few months after the sale of its bonds as above narrated, are truly startling.

Surely by no art of legerdemain may a contract 22 years old become suddenly burdensome within only a few months after it was so clearly demonstrated and admitted to be a thing of great value.

It may not be denied that the facts here narrated, all uncontradicted, conclusively confirm the judgment of the trustees in 1913 that the execution of the lease would be to the advantage and best interests of the public the settlors of the trust and the trust itself. It should be noted that Citizens Gas, original trustee has not in this cause either alleged or intimated that the provisions of the lease were unreasonable or burdensome in any particular, or that the 22 years' operation under it had not fullfilled all the hopes and expectations of its then trustee as to the benefits and advantages to be derived by the public charitable trust from its execution.

IV.

The Ninety-nine Year Lease Was Properly Held to Be Valid and Enforceable According to Its Terms Against the Trust, Citizens Gas, Former Trustee, and City as Present Trustee.

This respondent is in entire accord with the contentions made for its bondholders at pages 56 to 74 of Chase's brief, and we shall seek to avoid repetition so far as possible of matters there stated.

The grounds alleged by City (Br. pp. 43-52) do, however, present distinct challenge to certain admitted facts and the accepted rules of law determining the validity and enforceability of the lease against it, as trustee, and the trust. The discussion here will be directed to the numbered points set out at pages 44 and 45 in City's Brief.

1, 7 and 14.

City here contends that the leasehold estate and property of Indianapolis Gas never became part of the trust *res* and that it did not accept a part of the *res* and refuse to accept another part. The contention that the trust *res* did not include the leasehold estate in Indianapolis Gas property is contradicted by the actual operation of the leased property by the trust as an integral part of the gas system from 1913 to the present time. No distinction has existed during all such period in the use of the properties held in fee by Citizens Gas and that held in leasehold estate. The entire system has been operated and used by the trustee in performing the functions of the public utility and in carrying out the purposes of the trust as defined in franchise and Articles of Incorporation of Citizens Gas.

Not only is this contention of City denied by these overt acts but it is also denied by every statement made by either Citizens Gas or City during this entire period. Both City and Citizens Gas stipulated with all parties in the Todd case that:

> "Defendant Company (Citizens Gas) also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company as created by a certain contract of lease for ninety-nine years dated September 30, 1913 and recorded in Miscellaneous Record 78, page 257 to 278 inclusive, of the records in the Recorder's Office, Marion County, State of Indiana." (III R. 943; offered II R. 333, par. 2.)

During the trial of the Williams case the City also stated in a motion to strike out certain parts of the complaint:

> "If the lease is valid, the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by Citizens Gas Company in its own right. If for any reason the lease is invalid, it will fall outside the scope of the trust." (II R. 808)

Had the court in the Fishback or in the Williams cases held the lease invalid then, as the City properly stated, it would be "outside the scope of the trust." But they having adjudged the lease to be a valid and enforceable one, then clearly it became part of the public charitable trust and is subject to be administered in the same way as the property owned outright by Citizens Gas. When the statements of the City made in 1935 in its prospectus describing the gas plant revenue bonds, as well as state-

ments previously made in the pleadings and to the courts in each the Fishback, Williams, Todd and Cotter cases are recalled, as well as the operation of the property as a unified system since 1913, the present contention of the City must appear only an afterthought as a ground for its unsupportable position.

The statement in City's point 14 at page 45 of its brief, that it has accepted the entire trust *res* but has at the same time rejected the lease, is thus wholly denied by the facts. It is also shown to be erroneous by the settled rule of law that a designated trustee, while having no obligations to accept the trust, may not accept it in part and reject it in part. An acceptance in part is an acceptance in whole, and in the instant case it has already been shown that City has accepted the trust in its entirety, including the lease.

In re Lord & Fullerton (L. R. 1896), 1 Ch. 228, 232, 233;

1 Perry on Trusts (7th ed.), Sec. 264, p. 476.

5.

No fixed date existed for the expiration of the term of trusteeship of Citizens Gas, the initial trustee. Under the provisions of the trust it had no fixed period of tenure. It was not to transfer the property to a succeeding trustee until its stockholders had been paid in full their investment with interest at 10% and it was only provided that the City *might* within 25 years succeed as trustee upon the stockholders being so paid either from earnings of the company or at the end of 25 years through financing to be effected by the City. No *obligation* rested upon City to succeed to such trusteeship, and had it not done so the trusteeship of Citizens Gas would not have ended. It is well established

that equity will not permit a public charitable trust to fail by failure of any particular prospective successor trustee to accept the trust. The trust continues in perpetuity and neither the length of the term of any trustee nor the identity of its successor can have any effect upon the obligations of the trust validly created. The exercise by the City of its option and its acceptance of conveyance of the trust, subject to all legal obligation, was merely to substitute a new Trustee.

8.

The Articles of Incorporation of Citizens Gas and its franchise, as well as its charter (I R. 81, 95; offered II R. 327), deny City's statement that the original trustee was without power to make the 99 year lease. No rule is more firmly settled, or necessary for the proper administration of trusts, than that which holds that a trustee shall have such powers as are necessary and reasonable to the carrying out and performing of the general objects of the trust. Had the public utility act of 1913 not been passed giving the express power, Citizens Gas would yet have been vested with such power by its Articles, Charter and Franchise.

The City at page 52 of its brief admits that "Citizens Gas, in its franchise contract, bound itself to extend its lines and mains so that 'all inhabitants of said City may be supplied with gas for fuel and lighting purposes when they may reasonably require the same'." By no other means than by purchase of additional property or by leasing it could Citizens Gas have fulfilled this obligation.

The Public Utility Act, and particularly Section 95½ (Appendix A) thereof, has already been sufficiently presented to the court and were it conceivable that no power

had existed in Citizens Gas to make this lease before the enactment of that law, no doubt could remain thereafter that such power was given to Citizens Gas as a public utility.

That the power and authority of Citizens Gas to function as a public utility was not affected by the fact that it held its property as a Trustee of a public trust is conclusively decided by the following language of Judge Treanor at page 457 of the opinion in the Williams case, 206 Ind. 448:

> "It is necessary to recognize that Citizens Gas is a public utility and as such is amendable to the law to the same extent as any other public utility * * * nor can any beneficial interest of appellant and members of his class in the property or business of Citizens Gas preclude the State from exercising all control over the affairs of Citizens Gas which the State has power to exercise by reason that Citizens Gas is a public utility."

The power of Citizens Gas, the initial trustee, to execute this 99 year lease may not now be seriously or successfully challenged.

Only General Statutes and What They Provide As to Everybody Constitute Any Part of the Charter of Citizens Gas

The Constitution of Indiana provides that "Corporations other than banking shall not be created by special act, but may be formed under general laws," and Citizens Gas could not be an exception.

> Const. Ind., Art. 11, sec. 13;
> *Marion Trust Co. v. Bennett*, 169 Ind. 346, 350.

The Statute of Indiana under which Citizens Gas was organized (Appendix F; Acts 1905, pp. 434, 435) authorized the formation of a corporation "to carry on any of the following named purposes," six in number, if the persons organizing it would "make, sign, and acknowledge * * * a certificate * * * which shall state (1) the corporate name * * * (2) the object or objects of its promotion, which shall include any or all of the purposes included in any one of the above subdivisions of this section, (3) the amount of capital stock, (4) the term of its existence (not to exceed 50 years), (5) number of directors and the names * * * for the first year, and (6) the name of the city or town in which its principal place of business is to be located, and file the same * * *"

Citizens Gas provided in its articles that "the term of existence shall be 50 years" (I R. 99, XIII; offered II R. 327), and that its "object" should "be to supply the City of Indianapolis and its inhabitants with light, heat and power" (I R. 95, III; offered II R. 327), which was the second, numbered "(b)" of the six purposes for any one of which incorporation was authorized.

There was no statutory authority whatever (and never has been) for assumption by this public utility corporation, as such, of any trust relation or duties. And under the law of Indiana all that was written into the Articles of Incorporation not expressly directed by the statute to be therein was and is void as to the corporation itself, except only as constituting a private contract between the promoters and stockholders subscribing thereto.

Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 595;
State ex rel. v. Anderson, 31 Ind. App. 34, 42-43;

Mercantile Com. Bank v. Southwestern Corp., 93 Ind. App. 313, 328;
McCallister v. Shannondale etc Co., 47 Ind. App. 517, 524, 526-529;
Farmers M. F. I. Co. v. Jackman, 35 Ind. App. 1, 11-12;
Shaw v. Bankers N. L. I., 61 Ind. App. 346, 354, 355;
Supreme Lodge K. P. v. Knight, 117 Ind. 490, 495.

And under said law the "Charter" of the corporation, and all that determines its powers and duties as a corporation consists of the general law of the State and what that general law has directly authorized to be in its articles.

Westport Stone Co. v. Thomas, 195 Ind. 319, 327;
Supreme Lodge K. P. v. Knight, 117 Ind. 489, 495.

But in addition to 12 lines of the Articles of Citizens Gas which stated the facts authorized by the statute, the promoters also wrote into its Articles other provisions extending to more than twelve times as much additional (1500 words in 9 long sections) of a private agreement concerning the disposition of the company's earnings, *first* to pay all investors 10% per annum so long as they should hold stock; *second*, to repay all stockholders by the end of 25 years the full amounts invested; *third*, to give the City an option at the end of 25 years to pay any balance due the stockholders; and *fourth*, on the stockholders receiving back the amounts invested, with 10% per annum thereon, at the end of 25 years to convey the "gas plant and property to said City subject to" obligations incurred in obtaining money paid to the stockholders, "and other legal obligations against said company" (I R. 98, 99, X, XII; offered II R. 327). Similar contract stipulations had been written

into the Franchise Contract between the City and the assignors of Citizens Gas (I R. 81 to 95; offered II R. 327), and were written into the stock subscriptions (II R. 766, 767) and into the certificates issued for shares of stock (II R. 767, 768; offered II R. 328). And in an action by stockholders asserting their absolute ownership of the property accumulated by Citizens Gas it was decided that a Public Charitable Trust had been created in whatever interest they had as stockholders in excess of cumulative dividends of 10% per annum, plus the return of all they invested, but subject to legal obligations and *bona fide* indebtedness.

Todd v. Citizens Gas Co. (C. C. A. 7), 46 Fed. (2d) 855, 859, 860, 862, 864;
Cotter v. Same, same opinion.

9 and 10.

That the City did not sign the lease in 1913 or was not named as a party is true, but no support is given City's present contention thereby.

Obviously the City did not sign the lease in 1913 because it had no connection with the administration of the trust at that time. Citizens Gas was then operating as a public utility and sole trustee and it alone could by the lease create the leasehold estate. Furthermore, at the time of the execution no certainty existed that the City would ever succeed to the trusteeship. It had no obligation to do so and no expression or election to exercise its right of succession was made until the resolution of the City's Board of Public Works of March 20, 1929.

The lease, however, did bind Citizens Gas, the original trustee "itself, its successors and assigns"; and as such successor and assignee City as trustee is equally bound with Citizens Gas to the performance of its obligations.

11.

This respondent has already discussed in this brief the acceptance of the assignment of the lease by the City and its taking possession and assuming operation of the leased property. The City may not contend that it could voluntarily receive property under conditions expressly set out in the instruments of conveyance and then immediately thereafter deny the same by *ex parte* action and have such action clothed with validity by law. One may not purchase property and immediately upon its acceptance, resolve not to pay the purchase price. If the conditions attached to the instruments of conveyance, or the price of the property purchased, is not satisfactory, the grantee or the purchaser should accept neither the conveyance nor the property. Once accepted, the liabilities incidental thereto may not be destroyed by wishful thinking, however formal may be its *ex parte* expression.

From pages 45 to 48 City argues in its brief that support is given its present position by Sections 85 and 254 of Chapter 129, of the Indiana Acts of 1905, the Cities and Towns Act.

These sections of this act have no application whatever to any question presented in this appeal. They are a limitation only upon contracts under which *direct* obligations of a City, as a municipal corporation, are created and which become a charge upon the taxing powers of the municipality. They pertain to agreements such as for lighting streets or furnishing heat to municipal institutions.

Fox v. City of Bicknell, 193 Ind. 537.

Were this act any inhibition upon the activities of the City as a trustee in administering this trust, a serious cloud

would fall upon the validity of the gas plant revenue bonds issued by the City itself which do not mature for many years beyond the period set out in this statute. (II R. 539; offered II R. 404)

The cases cited by City: *Gas Light, Etc. Co. v. City of New Albany*, 156 Ind. 406, and *City of Indianapolis v. Wann*, 144 Ind. 175, offer no support to its contention. In the former case, the City of New Albany made a contract for 23 years for the lighting of its streets and granted a franchise to carry out said contract. It exceeded the then statutory period for which the City might contract for lighting and was therefore held invalid. In the second case, a contract was held void by a statute which prohibited city agreements that undertook payments "beyond existing appropriations". The undertakings to pay for the lights was in each case a direct obligation of the city and therefore amenable to the particular statute. It will be noted that when these early cases were decided, the State had not yet taken away power of cities to grant franchises to utilities and conferred it upon the Public Service Commission, as was done in the Acts 1913, Chapter 76. (Appendix E, G, H, I)

City of Vincennes v. Vincennes Traction Co., 187 Ind. 498, 503;
Public Service Com. v. City of Indianapolis, 193 Ind. 37, 47.

City, before both District Court and Circuit Court of Appeals, urged this statute as a defense to its present position and in each instance it was denied. The District Court in its opinion characterized this ground of defense as follows:

> "The lease was not an agreement by the Indianapolis Gas Company to furnish gas to the citizens of Indianapolis * * *. It was simply a contract by it with another corporation to permit such other corporation to use its property for a definite time upon payment to it of a definite and fixed consideration. Furthermore, no appropriation under this statute is necessary, because it was admitted by plaintiff, on oral argument, that it does not contend the payment of the rental, or any part thereof, can be enforced from the general fund of the City or from any other fund than the income derived from the operation of the trust and from such trust property. It is, therefore, apparent that neither of these sections of the statute has any application to the facts in this case." (III R. 1152, 1153)

Other sections and acts of the legislature also definitely preclude this particular act of 1905 from supporting City's contentions. Said Cities and Towns Act of 1905 also provided:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:
>
> * * * * *
>
> "Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." Acts of 1905, Chapter 129; Burns' Ind. Rev. Stat., 1933, Section 48-1407.

The Indiana Acts of 1929, Chapter 77, page 252, provides for the creation of the Department of Utilities for the City of Indianapolis and in defining its powers provides in paragraph 7 of Section 3 that it may

> "take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any lease, and to obtain and preserve the benefits therefrom." (Appendix D)

It continues to provide the board with power to secure the benefits incident to taking down bonds under an open mortgage and to authorize their sale under direction of the Public Service Commission.

Paragraph 7, Section 3, grants power to the board

> "to take over all contracts and rights of any kind or character, and to fulfill and perform all obligations relating to the property and business of any utility company whose property may be taken over by any such city."

In Chapter 78, Sec. 1 of said act of 1929 (Appendix C), the right of City to accept this particular trust property was expressly granted. The act provided that, as to any corporation organized to furnish light, heat and power to any city (Citizens Gas), the property of such corporation might be conveyed to the city

> "*subject to the outstanding legal obligations of said corporation*, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation * * *"
>
> "Said municipal corporation shall be *authorized to accept, hold and own* all the property of such

> corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and *any right, title or interest such transferring corporation may have in any lease upon other property* * * *"* (Appendix C.)

Both last above acts of the legislature were prepared by and passed at the instance and request of the City of Indianapolis (II R. 729; III R. 855; offered II R. 328, 334) and since their passage no doubt can exist as to the power of the City to accept this trust, with both the benefits and obligations attached to the 99-year lease.

Eight years after the lease was made, Citizens Gas did surrender to the Public Service Commission its 25-year City franchise and accept an indeterminate permit, without limit as to term of existence (II R. 722; offered II R. 328), all in full compliance with the law (Appendix E, G).

> *Williams v. Citizens Gas Company*, 206 Ind. 448, 458.

The 25-year City franchise under which Citizens Gas commenced business was surrendered under statutory authority in 1921 (III R. 822; offered II R. 327) and was thereby entirely abrogated.

> *Central Union T. Co. v. Indianapolis T. Co.*, 189 Ind. 219, 230-231;
>
> *Farmers etc. T. Co. v. Boswell Tel. Co.*, 187 Ind. 371, 381-382;
>
> *Greensburg W. Co. v. Lewis*, 189 Ind. 439, 453-454.

At page 48 of its brief the City apparently seeks to characterize itself as a "remainderman" and to argue

therefrom that the lease is invalid as against it in such capacity. Obviously no rights of a remainderman are involved in this case. The City is not the remainderman but solely the succeeding trustee of a public charitable trust which continues in perpetuity. The trust property could only vest in it by conveyance and assignment. Discussion has heretofore been had of the rule that the power of a trustee to execute a lease and its reasonableness is determined by the duration of *the trust* and not by the length of tenure of any particular *trustee*.

Citizens Gas and Indemnity Agreement.

Further support of the decision now before this court for review is found in the position of Citizens Gas and in the indemnifying agreement of September 9, 1935, given by City to Citizens Gas (II R. 306-307; offered II R. 327)

After the decision of the Circuit Court of Appeals, ordering judgment against all defendants in certain order of liability, Citizens Gas sought no rehearing of that decision by petition, nor has it sought the review of that decision by this court by a petition for certiorari. It has, in fact, at all times since 1913 properly insisted that it was fully empowered to create for the trust the leasehold estate in the property of Indianapolis Gas. In its answer and counterclaim in this cause it alleged:

> "Its directors, officers and trustees had complete power and authority to execute and enter into the said lease in the manner and form as aforesaid, and admits that the said lease was valid and binding upon this defendant and its property from the date of the execution thereof to the time this defendant conveyed, transferred and assigned all of its said property to the City of Indianapolis as aforesaid." (I R. 237).

It also alleged that it was at all times a trustee of the public charitable trust

> "and all rights, property and assets then or thereafter acquired were held by it as such trustee" (I R. 233).

See also *Magie v. German Evangelical Church*, 13 N. J. Eq. 77, 89, 90, Aff'd 15 N. J. Eq. 500;
Mills v. Davison, 54 N. J. Eq. 659.

By its own averments the primary obligations of Citizens Gas under the lease ended only when it "conveyed, transferred and assigned all of its property to the City." Obviously its liability, as a principal for the payment of the rental under the lease, changed to that of a surety only upon the acceptance of all its property by City.

On September 9, 1935, City gave to Citizens Gas an indemnity agreement which provided in part as follows:

> "The City of Indianapolis further agrees that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, directors and trustees, from any and all loss, damage, costs, charges, *liability* or expense on account of any pending actions or suits which may have heretofore been instituted against said company and on account of any actions or suits which may hereafter be brought against said company, arising from any and all acts or omissions to act on the part of said company of any nature whatsoever" (II R. 306, 307; offered II R. 327).

In the light of this indemnity and of the admitted liability of Citizens Gas under the lease it would seem entirely immaterial whether or not the City did in fact reject

the lease. If the lease were rejected, then by accepting the property held solely in fee by Citizens Gas, City became bound by its indemnity agreement to discharge the admitted liability of Citizens Gas under the lease. For this additional reason, therefore, it is submitted that City's objections to the judgment of the Circuit Court of Appeals are without support.

V.

Decision of the Circuit Court of Appeals Is in Complete Harmony with the Statutes and Decided Law of the Courts of Indiana, and the Rule of Erie Railroad Co. v. Tompkins Is in No Wise Violated.

Indianapolis Gas contended, before both the District Court and the Circuit Court of Appeals, that the questions presented in this cause were all to be determined by the decisions and laws of the State of Indiana under the rule of this court as announced in *Erie Railroad Co. v. Tompkins*. The decision of the Court of Appeals itself indicates that it is based upon the statutes and settled decisions of Indiana.

The decision is apparently based neither on *estoppel* nor *res adjudicata* but is the independent judgment of the court, based upon the controlling laws of Indiana. The matter of estoppel discussed in the brief of City has heretofore been sufficiently argued in this brief. The contention of City (Br. p. 64) that an Indiana municipal corporation may not be estopped by any acts done by its municipal officers in excess of their authority has no relevancy to any question here presented. In the instant case all acts done by the City, from its appearance before the Public Service

Commission in 1913 through its corporation counsel to its succession as trustee of the public charitable trust and the acceptance of the trust property, including the leasehold estate, were done lawfully and under express authorization by the different statutes. No officer of the City has done other than as expressly provided by the laws of the State controlling its succession to the trusteeship, *except* its attempted refusal to comply with the instruments of conveyance providing that they were made all subject to the obligations of Citizens Gas, including the obligations under the lease.

Discussion has heretofore been had in this brief as to the effect of the order of the Public Service Commission approving the lease and upon all matters argued by City at pages 67 to 71 of its brief. Had the Court of Appeals placed its decision solely upon the prior decisions of Indiana courts in *Fishback v. Public Service Commission* and *Williams v. Citizens Gas* as being *res adjudicata* of the validity and enforceability of the lease against the City, no valid objection to the decision upon that ground could have been raised. We have, heretofore, discussed these decisions at length, not necessarily as *res adjudicata* but as determinations of law binding upon the courts of the United States. So far as the Fishback and Williams cases are concerned, this respondent's prior discussion will not be here repeated.

The cases of *Todd* and *Cotter v. Citizens Gas* (46 Fed. (2) 855) have never been urged by this respondent as directly determining the validity or invalidity of the lease. They did decide, however, that Citizens Gas was the trustee of a public charitable trust and that if and when City took over, it would take such property as a succeeding trustee of a continuing trust. These cases did determine that the

trust was one continuing in perpetuity, and defeat the argument of City that it is a remainderman or that the term of the lease was unreasonable as extending beyond the life of the trust. In the trial of those causes certain statements were made by City which are pertinent to the present questions. These statements, made by stipulation or answer, that the lease was entered into "pursuant to order of the Public Service Commission of Indiana and with full consent and approval of the City of Indianapolis", and that the *res* of the public charitable trust did include the leasehold estate, are all statements and admissions which were properly before the court in the determination of the present cause.

City presents no authority which denies that the decisions in the Fishback and Williams cases did clearly and conclusively decide that the lease was one which Citizens Gas had full power and authority to make and which, being valid, constituted since its execution part and parcel of the public charitable trust to which City has succeeded as trustee.

VI

Present Contentions of City Would Make the Public Charitable Trust Invalid and Fraudulent as Against Creditors, and Thus Nullify Decision in Todd v. Citizens Gas.

It was decided in *Todd v. Citizens Gas* that a public charitable trust existed in the property of Citizens Gas in which it was the initial trustee. The trust might after a certain period and upon the payment of a certain charge upon the trust be conveyed to the City, which would operate the same as successor trustee. The condition

precedent to such succession was the repayment to the stockholders of Citizens Gas, the settlors of the trust, of the face value of their stock, with cumulative interest thereon, at the rate of ten per cent per annum. Upon discharge of this condition precedent, the trust property might then be conveyed to the City, "*subject to all outstanding legal obligations.*" The decision was based by the Court upon the franchise contract entered into in 1905, and upon the statutes of the State of Indiana in force.

The contentions of the City in this cause directly violate that decision. They, in effect, urge that City, as successor trustee, may directly retire all stock and bonds of Citizens Gas and then receive and take over its entire property and assets, free from any charge for the payment of its existing obligations, and itself incurring no liability therefor. By so doing, it leaves Citizens Gas with no assets of any character whatever, save an indemnity agreement, to discharge its obligations incurred during its years of operation of the utility.

Had such a construction of the trust been reasonable, or the existence of such rights in the settlors or a successor Trustee been contemplated by or suggested to the Court, it could only have declared the trust void as being in violation of an express statute of Indiana and fraudulent as to creditors. Under such a construction, as is now urged by the City, the trust would virtually have been one in favor of its settlors, allowing them to retrieve from the trust, after thirty years of operation, its entire assets free from any charge to pay the obligations incurred during that period. Such a trust would have been held void in any jurisdiction under settled, universal rules.

There was before 1905, and has been ever since, a statute in force in Indiana declaring that

> "all deeds of gift, conveyances, transfers or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person."
>
> Burns' Ind. Rev. Stat. 1933, Sec. 33-409 (Appendix K).

This statute has properly been construed to embrace property both real and personal in which the trust assets may be invested.

> *Plunkett v. Plunkett*, 114 Ind. 484, 489;
> *Carter v. American Trust Co.*, 82 Ind. App. 587, 590.

While the Todd case did not itself directly decide upon the validity of the ninety-nine (99) year lease, it did decide, definitely and surely, that if and when Citizens Gas transferred and assigned all its assets and property to City as successor trustee, such assets and property would be so conveyed, *subject to all legal obligations of the grantor trustee.*

Respondent submits that the decision in the Todd case conclusively precludes such a construction and interpretation of the instruments creating the public charitable trust as is urged by City and it denies such rights to settlors or City, successor trustee, as the City seeks in this litigation.

VII

Circuit Court of Appeals Properly Refused to Order Judgment in Behalf of Chase for Interest on Unpaid Bond Coupons at the Rate of Six Per Cent Per Annum

The answer to the question presented by the cross-petition for a writ of certiorari in causes Nos. 423 and 424, filed by Chase, depends upon the construction of the bonds on which they pay the interest, and of the mortgage by which the payment of both bonds and coupons is secured.

Each bond recites that it is a "five per cent gold bond" and that it is payable with interest "at the rate of five per cent per annum" (I R. 25; offered II R. 327); each coupon recites that it is for "six months interest on its first consolidated five per cent gold bond No. ———" (I R. 27; offered II R. 327); and the mortgage deed of trust, besides setting out the form of the bonds and coupons, refers to them as "five per cent gold bonds" (I R. 27, 29; offered II R. 327), thus fully establishing what was the "rate per cent agreed upon in the original contract sued on."

The sections of the statute recited on pages 136, 137, of Chase's brief, filed December 7, 1940, require a judgment to bear interest "at the rate agreed upon in the original contract sued upon" if there was an agreed rate, "and if there be no contract by the parties, then at the rate of six (6) per cent per annum."

Burns' Indiana Statutes 1933, Sec. 19-2002.

They further provide generally that "in the absence of agreement," "On money due on any instrument in

writing * * * interest shall be allowed at the rate of six dollars per year on one hundred dollars."

Ibid., Sec. 19-2003.

The argument of counsel for the cross-petitioner, in effect, is that as to the coupons themselves "no rate per cent is agreed upon," because they "are silent as to the rate of interest to be paid on the coupons." An argument to the effect that said fact, together with the provisions in the mortgage itself that money collected by the mortgage trustee shall be distributed ratably to the persons holding coupons, "but without interest on interest" (I R. 40; offered II R. 327), is cause for refusing to allow any interest at all on the coupons until reduced to judgment, had prevailed in the District Court. But we do not know of any stronger argument to the effect that no more than five per cent per annum can be recovered on these overdue coupons, both before judgment and after judgment, than the very apparent fact that by "contract of the parties" there was "an agreed rate" of interest at 5% per annum, stated "in the original contract sued on."

Therefore, five per cent is the maximum per cent to which bondholders are entitled and Chase may not justly contend that the Circuit Court of Appeals erred in the rate of interest allowed upon unpaid coupons.

CONCLUSION

Indianapolis Gas respectfully submits that the unanimous decision of the Circuit Court of Appeals, now before this Court for review, was properly made in an exercise of certain jurisdiction of all the parties, and that it is in complete accord and harmony with the settled law of Indiana and should therefore be affirmed.

Respectfully submitted,

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Filed January 20, 1941.

APPENDIX A

(All emphasis in these quotations is ours.)

Indiana Acts 1913, Chapter 76, Section 95½, page 199:

> "That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission."

APPENDIX B

Indiana Acts 1905, Chapter 129, Section 53 (in part), page 247; Burns' 1933, Sec. 48-1407:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

First. To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication * * *"

"Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. * * *" *

APPENDIX C

Indiana Acts 1929, Chapter 78, Section 1, pages 268, 271:

"That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, *subject to the outstanding legal obligations of said corporation* (our emphasis), whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns, and

said town or city shall be authorized and entitled *to accept a transfer and conveyance of any such property* (our emphasis) in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city * * *"

"Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city, the title to such property shall vest in such town or city, *subject to* all outstanding *legal obligations* of said corporation * * *"

"Said municipal corporation shall be *authorized to accept, hold and own* all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and *any right, title or interest such transferring corporation may have in any lease upon other property* * * *"

APPENDIX D

Indiana Acts 1929, Chapter 77, Section 3, pages 257, 259:

"The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all neces-

sary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

(1) To condemn, appropriate, *lease*, rent (our emphasis throughout), purchase and hold *any real estate*, rights of way, materials or *personal property* within such city or within five (5) miles of the corporate limits thereof, needed for the proper giving of service by any such utility to the inhabitants of said city and the community contiguous thereto and served from any such utility plant * * *"

"(7) To take over, adopt and *assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition* of any utility by any such city, and to take any and all steps necessary to *perform* and fulfill the terms of *any such lease*, and to obtain and preserve the benefits therefrom; and in event there be any outstanding *open mortgage* upon the property *covered by any such lease* so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and *betterments of such leased property* and, subject to the approval of the public service commission of

Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such *leased property* * * *"

APPENDIX E

Indiana Acts 1921, Chapter 93, pages 197, 198:

"Any public utility operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in the act creating the public service commission of Indiana, entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

APPENDIX F

Indiana Acts 1905, Chapter 139, Section 1, pages 434, 435:

"Whenever three (3) or more persons may desire to form a company to carry on any of the following named purposes, to wit:

(a) Any kind of manufacturing, mining, mechanical or chemical business or to furnish motive power to conduct such business;

(b) To supply any city, town, village or community with water, light, heat or power;

(c) To own, construct, operate and maintain stockyards and transit companies and conduct and transact the business incident thereto;

(d) To own, construct, maintain and operate grain elevators or flour mills or both and transact the business incident thereto, including the manufacture of flour, meal and all grain and cereal products, and the buying and selling of grain and cereals of all kinds, and the manufactured products thereof, and also including the right to own and maintain motive power to conduct such business;

(e) To buy and sell any kind or kinds of merchandise in connection with the manufacture of such merchandise, and for the sale of such merchandise when manufactured. They shall make, sign and acknowledge before some officer capable of taking acknowledgements of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the object or objects of its promotion, which may include any or all of the purposes included in any one of the above named subdivisions of this section, the amount of the capital stock, the term of its existence (not, however, to exceed fifty (50) years), the number of directors and the names of those who shall manage the affairs of such company for the first year, and the name of the city or town in which its principal place of business is to be located, and file the same in the office of the recorder of such county, where it shall be recorded, and a duplicate thereof in the office of the secretary of state;

(f) To buy, sell and lease lands and buildings and other structures thereon, and to erect dwellings and other buildings and structures on lands leased or purchased."

APPENDIX G

Indiana Acts 1913, Chapter 76, Sections 100, 101, pages 201, 202:

"Sec. 100. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the license, franchise or permit may be revoked by the commission for cause or that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor the then value of such property as determined by the commission and according to the terms and conditions fixed by said commission, subject to all the provisions as to hearings and appeals set out in section one hundred and five (105) and section one hundred and six (106) hereof. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. If this act should be repealed or annulled then all such indeterminate franchises, permits or grants shall cease and become inoperative and in place thereof such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issue of the indeterminate franchise, permit or grant; but in no event shall such reinstated license, permit or franchise

be terminated within a less period than five years from the date of the repeal or annulment of this act."

"Sec. 101. Any public utility operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act: and such public utility shall hold such permit under all the terms, conditions and limitations of this act."

APPENDIX H

Indiana Acts 1913, Chapter 76, Section 97, page 200:

"No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise or permit without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility. Any existing permit, license of franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby declared to be against public policy and is hereby amended in such manner as to permit a municipality to grant a license, franchise or permit for the operation of such second public utility pursuant to the provisions of this act."

APPENDIX I

Indiana Acts 1913, Chapter 76, Section 110, pages 205, 206:

"Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways, or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in sections 57 to 71 the Commission shall set a hearing as provided in sections 57 to 71, and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: Provided, however, When-

ever after a request by petition in writing of any public utility, the city or other political subdivision or other body, having jurisdiction of the matter, shall refuse or fail for a period of thirty (30) days, to give or grant to such public utility permission and authority to construct, maintain and operate any additional construction, equipment, or facility reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said commission for such right and permission, which petition shall state with particularity the construction, equipment or other facility desired to be constructed and operated, and show a reasonable public necessity therefor, and also the failure or refusal of such city, political subdivision or other body to give or grant such right or permission; and the commission shall thereupon give notice of the pendency of such petition, together with a copy thereof, to such city or other political subdivision or body of the time and place of hearing of the matter set forth in such petition; and such commission shall have power to hear and determine such matters and to give or grant such right and permission and to impose such conditions in relation thereto as the necessity of such public utility and the public convenience and interest may reasonably require."

APPENDIX K

Burns' Indiana Statutes 1933, Section 33-409.

"*Deeds in trust for grantor.* All deeds of gift, conveyances, transfers or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such persons."

APPENDIX L

Indiana Acts 1913, Chapter 76, Sections 105, 130, pages 203, 214.

"Sec. 105. The commission shall thereupon proceed to set a time and place for a public hearing upon the matters of the just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public, and of all other terms and conditions of the purchase and sale and shall give to the municipality and the public utility interested, not less than thirty (30) days' notice of the time and place when and where such hearing will be held, and such matters considered and determined, and shall give like notice to all bondholders, mortgagees, lienors and all other persons having or claiming to have any interest in such public utility by publication of such notice, once a week for not less than three (3) successive weeks, in at least one (1) newspaper of general circulation printed in the English language and published in the county in which such public utility is located, which publication shall be caused to be made by the municipality. Within a reasonable time, not exceeding one (1) year after the time fixed for such hearing in such notice, the commission shall, by order, fix and determine and certify to the municipal council, to the public utility and to any bondholder, mortgagee, lienor or other creditor appearing upon such hearing, just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public and all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable, allowing not exceeding one hundred twenty days (120) for the payment of such compensation. The compensation and other terms and conditions of sale and purchase thus certified by the commission shall constitute the compensation and

terms and conditions to be paid, followed and observed in the purchase of such plant from such public utility. Upon the filing of such certificate with the clerk of such municipality and payment of the compensation fixed the exclusive use of the property taken shall vest in such municipality."

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"Sec. 130. All acts and parts of acts conflicting with the provisions of this act are repealed in so far as they are inconsistent herewith."